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# IN THE SUPREME COURT OF THE UNITED STATES.

*Northern Securities Company, Appellant,*

vs.

*The United States.*

October Term, 1903.

No. 277.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA.

In re *Northern Securities Company's Appeal.*

## BRIEF.

In this brief, it is not meant to discuss the case with any elaborate presentation of evidence or with numerous citations of authorities. This has been done in other briefs, and, without wearisome repetition and appropriation of the labor of colleagues, nothing more can be done, with advantage, for the cause of the appellants, than to consider the subject under general heads, assuming as sound, certain legal propositions which have been heretofore demonstrated.

The legal merits of the controversy, however, cannot be properly discussed, even in a general way, without restating some of the cardinal underlying facts: (1) because those found by the court below cannot be deduced from the testimony; and (2) because the substratum of the bill filed, of the arguments in the court below, in its support,

and of the decision by that court, was the assertion or assumption, of a conspiracy which never existed.

The incorrectness of the Circuit Court's findings, to which findings we will refer later, has been demonstrated, we think, by Mr. Grover's brief. If not, we can add nothing thereto.

In substance, the United States charged a conspiracy between certain individuals, named as defendants, viz., James J. Hill, William P. Clough, D. Willis James, John S. Kennedy, J. Pierpont Morgan, Robert Bacon, George F. Baker and Daniel Lamont, to restrain and monopolize commerce amongst several States of the United States and to prevent competition between two competing railway companies, the Great Northern and Northern Pacific, by forming a corporation, the Northern Securities Company, designed and intended for the accomplishment of their alleged illegal purpose by its acquisition of a controlling interest in the shares of both.

The bill charged that the Northern Securities Company was formed in pursuance of such conspiracy, and further, that in pursuance thereof, it acquired a majority of said shares. The appellants concede that the Northern Securities Company did, after its formation, acquire a majority of said shares. This concession carries with it an acknowledgment that such acquisition was because of its intent to acquire. The company is therefore chargeable with all the legal consequences of an intentional acquisition by it of said shares. We deny, however, that any individuals or corporations, conspired together to do anything, other than to form a corporation which, when formed, was intended to acquire shares of stock to them belonging, amounting to a majority of the shares of the Northern Pacific Railway Company and about twenty-seven per cent. of the shares of the Great Northern Railway Company. We contend that the subsequent acquisition of about fifty per cent. additional of Great Northern shares from third persons, who had not been consulted about said formation and over whose shares the parties stigmatized as conspirators had no con-

trol whatever, was the result, not of any conspiracy, but of an acceptance by such third persons of an invitation to sell, issued by the Northern Securities Company after its formation. The acquisition of these additional shares was after the consummation of the alleged conspiracy and after the alleged conspirators had parted with their shares in the two railway companies. This addition to the shareholding body of the Northern Securities Company diminished the voting power of each of those who had been instrumental in its incorporation.

It is true the authorized capital stock of the company was made sufficiently large to permit an acquisition by it, of all the shares of the stock of both railway companies; but this was in pursuance of no combination, conspiracy or contract, but of a policy which had always actuated the individual appellants, viz., to give to co-shareholders the benefit of every advantage obtained for their own shares. They meant to give others an opportunity to sell their shares to the appellant corporation; but they were indifferent as to whether they would, or would not, make avail of the opportunity.

A feature of the organization of the Northern Securities Company, peculiar, as compared with that of some other large corporations, was, its acquisition of shares of the Great Northern, not at an inflated price, but at one less than the then selling price in the market, and of shares of the Northern Pacific at cost, or less.

The argument of the case in the Circuit Court was practically upon bill and answer. No witnesses were called who contradicted any fact stated in the answer. Those called were principally the individuals alleged to have engaged in the so-called conspiracy. Their testimony was corroborative, in every particular, of the answer. From beginning to end, nothing appeared, which indicated, in the most remote degree, any desire, intent or expectation, on the part of any concerned, to restrain or monopolize trade or commerce.

We would concede that if a contract had been entered into to restrain trade or commerce, or in restraint thereof,

or even to monopolize the same, that the lack of intention to restrain, or to monopolize, would not excuse it, although it is doubtful whether a crime can be committed in the absence of any criminal intent.

Solely for the protection of the Northern Pacific Railway Company against a raid in the interest of a competitor, the so-called conspirators determined to put a majority of the shares of that company and a part, but not the controlling part, of those of the Great Northern Railway Company, into a corporation to be organized under the auspices of some of them. This was their intent. Their overt act was the formation of such company.

If the mere formation of the company violated the Sherman Act, by restraining or monopolizing trade or commerce, an absence of evil intent was of no consequence. If, however, such formation did not itself restrain, or monopolize, trade or commerce, but can only be held illegal if it resulted from an intent, through or by means thereof, thereafter to restrain or monopolize such trade or commerce, the intent must be established as a fact by the United States, upon whom rests the burden of proof. Only in such contingency, can intent be material. To the extent that any such intent was found by the court below, the finding rested upon no sustaining evidence. Whilst, if the Sherman Act was violated by the acquisition by the Northern Securities Company of the ownership of a controlling interest in the shares of the two railway companies, the absence of an intent to restrain trade or commerce is unimportant, such intent is important, if such acquisition did not, of itself, amount to a violation of the Act, but might be such, if it was part of a scheme to restrain or monopolize trade or commerce. An intent to restrain trade and commerce, however, cannot be deduced from an intent to form a corporation to acquire a controlling interest in the shares of two competing railway companies, if the ownership of such shares by such corporation, is not violative of the Act. In such event, the intent is to do what is legal, viz., merely to acquire such ownership. If the

ownership of a controlling interest in shares of competitive railway companies, is condemned by the Sherman Act, it is immaterial whether the acquisition is by a company formed for the purpose, or by one in actual existence—whether it resulted from a purchase by a company already in existence, or by one created by persons combining together, in order that by it the purchase might be made.

The Northern Pacific and the Great Northern Railways, though not parallel in any strict sense, run from Lake Superior and the Mississippi River to Puget Sound, through the same States. They are separated at most points by an intervening country, hundreds of miles in breadth. They come together at two or three points in said States. To a certain extent, they are competitive; but about seventy-five per centum of the business of each is non-competitive, because it originates, or is consigned, to a point or points on the line of one, not reached by the line of the other. About twenty-two per centum of the freight, nominally competitive, can be transported by other systems of railroad. No concert of action between the Northern Pacific and Great Northern, in the way of diminishing facilities or of raising rates, or the like, as to such freight, would be possible, because such action would give the transportation to competing lines. Much has been said, and written, about the destruction of competition between these two companies and the possible ill results therefrom; but in reality, nothing but the smallest minimum, of ill consequences, can possibly flow therefrom.

Both railway companies have competitors, in interstate, and international, transportation. On the north, is the Canadian Pacific Railroad, which dips down to St. Paul and extends to the Pacific Coast. On the South, is the Railroad of the Union Pacific, which holds a large, or controlling, interest in the shares of the Central and of the Southern Pacific, Railroad Companies. By reason of its geographical position, nearer to the cotton fields of the South, and to California, it is the natural carrier

of cotton to the Pacific Coast, and thence by steamers, to the Orient.

The Great Northern Railway Company, as now constituted, commenced business about 1893. The Northern Pacific Railway Company, reorganized in 1896, started, at that time, upon the career of prosperity it has since pursued.

Mr. Hill's desire, on the part of the first-named company, participated in by Mr. Morgan and others, on the part of the last named, was, so to reduce rates upon lumber and heavy natural products of the far West, as to make it possible to transport them to Eastern markets. Lumber, being very bulky, in proportion to its value, could not be transported, unless the cost thereof could be made permanently low. It was impossible to make the rates sufficiently low to get it to the Eastern markets, at a remunerative price, if the cars which transported it, must return empty. Such return would oblige lumber carried one mile, to pay the cost of two miles of transportation.

The necessary expenditures which must be incurred by lumbermen, in cutting timber, and in erecting mills and manufactories, would require some preliminary assurance of permanency of rates. The problem to be solved was the securing west-bound freights, for returning lumber cars.

The Burlington Railroad was connected with the Northern Pacific and with the Great Northern Railways. In no way was it a competitor with either. It reached the coal fields of Illinois. This coal was imperatively needed in some of the States through which ran the Northern Pacific and Great Northern. It reached Chicago, and other markets of steel products east of the Mississippi River. It also afforded a means by which wheat and other cereals, could be carried to markets east of said river. It reached the cotton fields of the South.

If cotton, coal, steel and other like products of the East, could be transported to markets on the Pacific Coast and of the Orient, the needed return freights for the lumber cars would be secured.

It was necessary to create a demand in the Orient for American cotton, flour and steel, which could only be delivered there, in competition with a cheap transportation, mainly by water, from Europe and India.

A necessary prerequisite to the creation of this new international commerce was an ability, on the part of those who were seeking to create it, to give assurance that the low rates which alone could induce its creation, would be permanent.

The supply of lumber from eastern sources was yearly decreasing. The time was fast approaching when the East must look to the West, for what could no longer be furnished to it from former sources. Permanent cheapness of transportation was the problem to be worked out. Those who sought to do so, had in view, of course, because human action is essentially selfish, the prosperity of their railroads which would transport. Their success, however, would establish a great interstate and international commerce, competitive with Europe and immensely beneficial to the nation.

All done, of which the Government has complained, was done with the intention of working out, with permanent results, this interstate and international, commerce problem.

Freight arrangements for connected transportation existed; but the Northern Pacific and Great Northern, which were seeking to create the commerce, were compelled to do what would enable them to assure those with whom they wished to deal, that the low rates with which they started would be, and could be, maintained. No such assurance could be given if the Burlington, whose railroad was an essential link in the connecting chain of transportation, might, in the future, be induced to make changes in its rates because of changes in its affiliations, or of the views and disposition, of its officials.

To promote a great public end, through a greatly increased commerce, at low rates, the Burlington Railroad shares were purchased by the two railway companies, at a price of upwards of $200,000,000, paid by their joint and sev-

eral bonds, upon which each, as between itself and the other, was responsible for a moiety.

By the acquisition of these shares, both railway companies were able to give such assurances of permanency of low rates and to do such other things, as were necessary in building up and enlarging this commerce. Their acquisition was without the slightest intention on the part of any connected with either of those companies, to alter the situation which then existed with regard to the ownership of the shares of the Great Northern and Northern Pacific.

Immediately upon the acquisition becoming known, those interested in the Union Pacific Railroad and its allied lines, appreciating the danger of a competition which would thus be made forever effective, and which involved the carrying northward, past its lines, by the Burlington Railroad, of the cotton of the South, to a connection with the two railways, made overtures for an allotment to them, of a portion of the shares. These overtures were declined. The refusal was followed by an enormous and startling movement in shares of the Northern Pacific, the United States making no complaint, which ended in an acquisition by the Oregon Short Line, acting undoubtedly at the instance, and for the benefit, of the Union Pacific Railroad Company, of a majority of the shares of the capital stock of the Northern Pacific, namely, 780,000, out of 1,550,000 of its shares, of the par value of $155,000,000. Unfortunately for those who purchased these shares, the capital stock of the Northern Pacific was of two kinds, common and preferred. Of its total issue, 800,000 shares were common and 750,000 were preferred. The latter, under provisions made at the time of reorganization, could be retired. Of the common shares, the Oregon Short Line had acquired but about 380,000.

Threatened with the probable injury to both railroad companies, burdened with the large indebtedness they had contracted in acquiring the Burlington shares, which would result from ownership, in the interest of the Union Pacific,

of a majority of the shares of the Northern Pacific, Messrs. Hill, Morgan and their friends, started to buy a sufficient number of the common shares to give them, upon the retirement of the preferred shares, a majority of the 800,000 stock. When the contest of buying ceased, they held about 420,000 common shares as against a holding by their antagonists of 380,000 of said shares.

The danger, however, was only temporarily checked. A sale by anyone of the Hill-Morgan party, holding a considerable number of the shares, would convert the minority holding of the Union Pacific into a majority holding. It was absolutely necessary, therefore, to provide forever against this risk, not for the purpose of restraining trade or commerce, but for the protection of the alliance formed by those who were endeavoring to promote it.

What was to be done? Permit the holdings of the shares to remain without safeguard, thus keeping the door open for the success of the enemy, whenever some owner should weaken in his allegiance, or should die? As some of the persons who held the Northern Pacific shares were very old, in the ordinary course of events, in a short time, changes of ownership must result.

All that followed was done for the purpose of preventing a similar raid to that which had so nearly succeeded; was done solely with the intent to secure the maintenance of the benefit to commerce, which had resulted, and which still more in the future, would result, from the acquisition of the Burlington shares. Ought a provision, intended to secure the permanency of increased transportation at low rates, be stricken down, as being in restraint of trade and commerce, when it was designed to prevent the acquisition by a rival competing line, of the majority of the shares of a railway company whose independence was necessary to the maintenance of an alliance without which such permanency was impossible? Should such a provision be held to be in violation of the letter, or of the spirit, of the Sherman Act?

It was conclusively shown by the testimony, that for years antecedently to the Burlington purchase, Mr.

Hill and some of his friends who had acted together from the outset, and who owned, in aggregate, about twenty-seven per centum of the Great Northern stock, had contemplated making some provision by which the policy they had acted upon, could be continued, despite the contingencies of death. The contemplated provision was a sale of their shares to a company, to be organized principally for that purpose.

It will not be pretended the Sherman Act is intended to interfere with the holding together of shares in any one Railroad Company, under a common ownership, for the purpose of promoting the interests of the holders and of the company itself. After the raid upon the Northern Pacific shares, these gentlemen, to protect its property and the joint interest in the Burlington, being then the owners of a much enlarged holding of Northern Pacific stock, determined to form a company which should become the owner of their own shares in both companies. They held about twenty-seven per centum of the shares of each. Their policy, having always been to put other holders of Great Northern shares upon the same footing they occupied, they determined, not because they cared to have them join, but solely because of this policy, to give to them the opportunity, after the company should be formed, if they should so desire, to sell to it their shares of the Great Northern.

After the raid, Mr. Morgan and his friends saw the necessity of protecting their holdings of Northern Pacific shares from a similar attempt, and they began to consider the forming of a company into which they could put their shares of said stock.

It was finally understood that a company should be formed which, after its formation, would purchase the shares of stock of both companies then held by Mr. Hill Pacific Railroad held by Mr. Morgan and his friends. and his friends, as well as the shares of the Northern If carried out, this plan would give to such company a majority of the Northern Pacific shares, but only about twenty-seven per centum of those of the Great Northern.

The only plan, and the only intent, was, that the company to be formed should hold a majority of the shares of the Northern Pacific and a minority of those of the Great Northern. There was no agreement by any of these parties that they would sell their own shares to the new company, though there was a general understanding to that effect. With this ownership, by such company to be formed, it would not be possible, thereafter, to turn the minority holding of the Oregon Short Line into a majority holding, by a purchase of less than a majority of the shares of such new company.

The subsequent announcement, to the other holders of shares of the Great Northern, who had taken no part in the formation of the company, and who had not been, in any way, consulted, and who had made no agreement of any sort or kind about their shares, was with no other intent than to give them an opportunity to deal with them as Messrs. Hill, Morgan and their friends had dealt with their own. The capital stock of the new company was fixed at $400,000,000, so that if all should see fit to avail themselves of the opportunity to buy, they would be able to do so. If they should not, the unissued capital of the company could be used in the furtherance of other valuable purposes. There was no inducement to come into the arrangement by an offer of a tempting price for the shares. The price at which the Northern Securities Company expressed its willingness to buy Northern Pacific shares, was $115 per share, or less than the price at which they had been bought. The price at which Great Northern shares would be purchased was fixed at $180 per share, several dollars less than the selling price in the market.

After the organization, in fact very shortly thereafter, a considerable number of the outside holders of shares of the Great Northern, who doubtless believed what Mr. Hill had done with his shares might well be done by them with their own, accepted the offer of the Northern Securities Company. In consequence of such acceptance,

it found itself possessed, at the time of filing the bill, of about nine-twelfths of the total issue of shares of the Great Northern.

As soon as those interested in the Union Pacific Railroad saw they had failed to secure a majority of the shares of the Northern Pacific, that they must wait for a future chance, before they would be able to acquire additional shares, and that such chance would not be likely to occur if a new company would acquire a majority of said shares, they sold to Mr. Morgan, for a satisfactory price, their shares, receiving payment, partly in cash and partly in stock of the new company. This sale, shortly after its organization, put the Northern Securities Company in possession of nearly all the shares of the Northern Pacific.

The acquisition of the majority of the shares of the Great Northern was an act concerning which no agreement was made by Messrs. Hill, Morgan and their friends, and concerning which it had been impossible for them to make any agreement.

Following the acquisition of the Burlington and the protection of its purchase by what had been done by the formation of the new company, there has been a development of trade and commerce which has fully confirmed the judgment of those who did what is condemned by the United States as a conspiracy, and which makes an accusation of any intent to restrain trade or commerce absurd.

The lumber business has been developed enormously. A large movement in cotton and steel products to the Orient has been created. Transportation rates have been lowered. Flour is being carried to China, two thousand miles by rail and fifty-seven hundred and fifty miles by water, at the rate of eighty cents per barrel, whilst the cost of carriage from the same point to New York, a distance of thirteen hundred and fifty miles, is fifty-five cents per barrel. The population of certain treeless States has been supplied with indispensable coal. All this has been done, not by destroying the trade of the Union Pa-

cific Railroad Company, which has increased, but by the creation, development and enlargement of a new interstate and international commerce, involving an increased competition with the Union Pacific for west-bound freight. The results are almost magical. The small percentage of really competitive freights, has not, in any way, been injuriously affected. The rates therefor have been lowered. Trade and commerce generally have been greatly extended and the public have secured the benefits, on a great scale, of competition between interstate and international competitors.

It is essential to production that there shall be a market for the product. The sawing of lumber, the digging of ores, the cultivation of grain and the raising of cattle will be of no avail, if they cannot be carried to those needing the same.

The alliance of the Burlington with the Northern Pacific and Great Northern was not limited to an obtaining for the latter, of traffic which otherwise would be carried over roads belonging to other companies. It was intended to increase trade, to create a new traffic that, otherwise, because of the inability to secure sufficiently low freight rates, would not exist.

This alliance, protected by the formation of the Northern Securities Company, produced the intended result. In the year ending 30th June, 1902, the increase of the freight traffic of the Northern Pacific over that of the previous year was 859,590,472 tons carried one mile—an increase of thirty-five per centum. The increase of the Great Northern's freight traffic in the same year, over that of the previous year, was 708,466,287 tons carried one mile—an increase of twenty-nine per centum. The increase of the freight traffic of the Burlington during the same period, over that of the preceding year, was 742,543,188 tons carried one mile—an increase of nineteen per centum.

In the year ending 30th June, 1903, the Northern Pacific's freight traffic increased over that of the year 1902 by 515,689,806 tons carried one mile—an increase

of fifteen per centum. The increase of the Great Northern's freight traffic in the same year, over that of the year 1902, was 416,617,694 tons carried one mile—an increase of thirteen per centum. In the same year, the increase of the Burlington's freight traffic over that of 1902, was 929,553,769 tons carried one mile—an increase of twenty per centum.

This increase was not simply the result of the general growth of the country, nor of a wresting from the Union Pacific and other companies, of a large portion of their traffic, although, to some extent, it did thus result. The major portion thereof, was the result of the alliance with the Burlington, which had been protected against disruption and dangerous interference, by the formation of the Northern Securities Company.

The fact of the creation of a new traffic, is shown by a comparison with the operations of the Union Pacific System during corresponding periods. By that system, a territory is served, similar to that served by the Northern Pacific and Great Northern, in connection with the Burlington. A great part of this territory thus served is common to all. The property is intelligently managed and equipped, and is in fine physical condition. Its connection with the large business of California is much more direct and is permanently assured, and it is thus given some advantage over its competitiors. It is an older system, more widely known than the others. In the year ending 30th June, 1902, the increase of its freight traffic over that of the previous year was 426,000,000 tons, carried one mile—an increase of fourteen per centum. In the year ending 30th June, 1903, its freight traffic was increased over that of 1902, by 275,675,352 tons, carried one mile—an increase of eight per centum. These rates of increase fairly represent general business conditions.

Necessarily, the greater increase of traffic over the other three railroads must have resulted from a new business, resulting from assured markets in Burlington's territory. One large item of increased traffic, assign-

able solely to the Burlington alliance, was the increase in transportation of lumber and other forest products. The figures for this increase on the Northern Pacific, illustrate the general increase. In the year ending 30th June, 1901, Northern Pacific handled 1,215,834 tons of lumber and 1,525,874 tons of other forest products. In the year ending 30th June, 1902, it handled 1,640,475 tons of lumber, and 2,054,219 tons of other forest products. In the year ending 30th June, 1903, it handled 2,013,510 tons of lumber and 3,076,877 tons of other forest products.

In the year ending 30th June, 1901, there were shipments of cotton-piece goods to Asia, via Great Northern, of 13,071 bales. The shipment of these goods over the Great Northern, in the year ending 30th June, 1902, amounted to 64,542 bales. The business of shipping raw cotton to Japan *via* the Great Northern, commenced a few years ago. Its beginning was made possible solely by cheap transportation, under the personal guarantee by Mr. Hill, of the suitableness of the American product, for the methods of spinning and weaving in Japan.

In the year ending 30th June, 1901, raw cotton shipped to Japan *via* Great Northern, amounted to 13,230,000 pounds. In the year ending 30th June, 1902, it had increased to 41,243,000 pounds.

The total exports of raw cotton to Japan by all routes—practically by Northern Pacific and Great Northern only—in the year ending 30th June, 1901, amounted to 35,879,665 pounds, and in the year ending 30th June, 1902, to 89,252,696 pounds. The trade, by reason of the assurance of permanency of low rates of transportation, has become so well established that in the face of the small crop and high prices of the year 1902-1903, the exports of cotton to Japan in the year ending 30th June, 1903, amounted to 76,413,291 pounds.

The assurance of permanent low rates *via* Burlington and Northern Pacific or Great Northern, led to the establishment of an export trade to Asia, of iron and steel. These products are being placed in Asia to the extent of

thousands of tons yearly, which, under the business conditions prevailing in this country, could not be sold, and, of course, would not be produced. The Government's statistics of trade to the Orient from Pacific Coast ports, show the benefit to trade which has resulted from the protected alliance with the Burlington. The "Monthly "Summary of Commerce and Finance," published by the Bureau of Statistics, for the month of September, 1903, gives the figures of the foreign trade through each port for the first nine months of each of the years 1901, 1902 and 1903. These figures show that while the foreign trade through the ports of San Francisco and those on the Columbia River, have remained practically stationary during the three years, the increase through the Puget Sound ports, where the Northern Pacific, and Great Northern's chief terminals are, during that period, has been about twenty-six per centum, or more than six million dollars per year.

The industrial progress and development of the United States, in connection with its immense natural resources, has brought the great industries of the country nearly to the point of over-production. New markets, in other countries, are necessary to meet this condition. Cheap transportation at permanent rates is necessary to the securing and holding of these new markets. The great problem of transportation is, therefore, the doing it better at cheaper rates, with a fair profit to the carriers. The proper solution of this problem, is equally important to carriers, producers and consumers.

Experience has shown that the greatest prosperity of any railroad results from carrying at low rates, the largest obtainable volume of traffic. To attract a business the rates must be low—regularly and permanently low—under a large and steady volume of traffic. The rate is determined by this volume. A low carrying cost and a low rate for carriage can only result from a reasonably steady, as well as large, volume of traffic. Such steadiness can result only from steadiness in the trade that occasions it, which latter is possible only when the arrangements for the trade are reasonably durable.

Such alliances as that of the Burlington with the Northern Pacific and Great Northern, are particularly valuable, because of the opportunity thereby afforded of securing a large number of markets in a great and rich territory, under a fairly permanent transportation policy. They are of enormous value to the people along the lines of the railroads, to the country generally, and to the world. It is all-important to a building up of trade in Chicago or St. Louis, or Kansas City, or Minneapolis, or St. Paul, or Duluth, or Omaha, or Denver, that those who are induced to enter into it can be assured of conditions of transportation, well known and understood, which can be reckoned upon permanently. To transact business large investments must be made, and the condition prerequisite to such investments, is reasonable assurance of continuance.

It is incumbent upon the United States, when it seeks to condemn an arrangement which has promoted the interest of the whole Nation, by pretending it was intended to restrain trade, to establish, very convincingly, the existence of the illegal intent it alleges to have existed.

If the acquisition of the majority of the shares of the two competing railway companies was a violation of the Sherman Act, such acquisition was the act, not of the alleged conspirators, who were indifferent to the acquisition of a majority of the Great Northern shares,and were powerless to compel it, but of the Northern Securities Company itself, in buying shares from persons other than the alleged conspirators, who sold, with no intent to do aught else than to exercise their right of conversion of their property upon receipt of a satisfactory pecuniary consideration.

The United States did not claim that the Northern Securities Company could not legally purchase the majority, or even all, of the shares of the Northern Pacific; but that it could not legally purchase, in addition, a controlling interest in the shares of the Great Northern. If this contention be correct, the remedy is, not to destroy the

value of all the property by it held, by decreeing it shall not vote the shares nor collect dividends thereon, but to order the sale of so many of the Great Northern, or of the Northern Pacific, shares, as will deprive it of a controlling interest in one or the other.

The question of law to be determined, is solely whether or not, the acquisition by a corporation, of a controlling interest in the shares of two competitive railway companies, is a violation of the Sherman Act. If such ownership does violate said Act, and if the Act, in prescribing such ownership, is constitutional, it is immaterial whether the corporation owning was formed for the purpose of making the acquisition, or, being already in existence, made the same. If it is not illegal for an existing corporation to acquire such controlling interest, it cannot be illegal for persons holding a sufficient number of shares, to enter into an agreement that they will form a company for the purpose of acquiring it.

An agreement to do what is legal, cannot be held to be an illegal conspiracy, combination or contract.

The questions presented to this court are: (1) does the Sherman Act make it a misdemeanor for a person or corporation, to acquire a controlling interest in the shares of competitive railway companies, and (2) if it does, is it constitutional?

Before stating certain propositions which will be discussed in detail, it may not be amiss to make some preliminary observations.

By the Sherman Act, trade and commerce are protected against unlawful restraint and monopolies, by punishment, criminally, of certain acts therein described and proscribed. The Circuit Courts of the United States are invested with jurisdiction, by proceedings in equity, "to pre-"vent and restrain" such acts.

The acts which can be prevented and restrained by such proceedings in equity are those, and those alone, made criminal by the first and second sections of the Sherman Act. The statute is therefore a penal one, defining a criminal offense, for which it provides a punishment. It is an indispensable prerequisite to a conviction for a crim-

inal misdemeanor, especially if there be no criminal intent, and such did not exist in the present case, that the offense condemned, shall be clearly defined. In this connection we give some citations supplied by a friend:—

In U. S. *vs.* Wiltberger, 5 Wheat., 76, Chief Justice Marshall said:—

> "The rule that penal laws are to be construed "strictly, is perhaps not much less old than con- "struction itself."

Judge Dillon, in *U. S.* vs. *Whittier*, 5 Dill., 35, said:—

> "Statutes creating crimes will not be extended "by judicial interpretation to cases not plainly and "unmistakably within their terms. If this rule is "lost sight of, the courts may hold an act to be a "crime when the legislature never so intended. "If there is a fair doubt whether the act charged "in the indictment is embraced in the criminal "prohibition, that doubt is to be resolved in favor "of the accused. (U. S. *vs.* Morris, 14 Pet., 464; "U. S. *vs.* Wiltberger, 5 Wheat., 76; U. S. *vs.* Shel- "don, 2 Wheat., 119; U. S. *vs.* Clayton, 2 Dillon, "219.)"
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> "'Where the statutory terms are of such uncertain "'meaning, or so confused, that the courts cannot "'discern with reasonable certainty what is intended, "'they will pronounce the enactment void.' Bishop "on Statutory Crimes, Section 41."

In Andrews *vs.* U. S., 2 Story, 213, Mr. Justice Story said:—

> "Penal statutes are to be construed strictly. "They are never extended by implication."

In U. S. *vs.* Hartwell, 6 Wall., 385, 396, Mr. Justice Swayne said:—

> "The words must not be narrowed to the ex- "clusion of what the legislature intended to em- "brace; but that intention must be *gathered from* "*the words*, and they must be such as to leave no "room for a reasonable doubt upon the subject."

In Swearingen *vs.* U. S., 161 U. S., 446, 451, it is said:—

"As the statute is highly penal, it should not be "held to embrace language unless it is fairly within "its letter and spirit."

In France *vs.* U. S., 164 U. S., 676, 682, it is said:—

"Although the objection is a narrow one, yet "the statute being highly penal, rendering its "violator liable to fine and imprisonment, we are "compelled to construe it strictly. * * * If it "be urged that the act of these plaintiffs in error "is within the reason of the statute, the answer "must be that it is so far outside of its language "that to include it within the statute would be to "legislate and not to construe legislation."

In Schooner Paulina's Cargo *vs.* U. S., 7 Cr., 61, it is said:—

"It is the province of the legislature to declare "*in explicit terms*, how far the citizen shall be "restrained in the exercise of that power over "property which ownership gives; and it is the "province of the court to apply the rule to the case "thus explicitly described; not to some other case "which judges may conjecture to be equally "dangerous."

In U. S. *vs.* Reese, 92 U. S., 219, it is said:—

"Laws which prohibit the doing of things, and "provide a punishment for their violation, should "have no double meaning.

"If the legislature undertakes to define by "statute a new offense and provide for its punish-"ment, it should express its will in language that "need not deceive the common mind. Every man "should be able to know with certainty when he "is committing a crime.

"It would certainly be dangerous if the legis-"lature could set a net large enough to catch all "possible offenders and leave it to the courts to "step inside and say who could be rightfully

"detained and who should be set at large. This "would, to some extent, substitute the judicial "for the legislative department of the Govern- "ment."

In U. S. *vs.* Comerford, 25 Fed. R., 902, it is said:—

"We have been taught to believe that it was "the greatest injustice towards the common people "of old Rome when the laws they were commanded "to obey, under Caligula, were written in small "characters, and hung upon high pillars, thus more "effectually to ensnare the people. How much "advantage may we justly claim over the old "Roman, if our criminal laws are so obscurely writ- "ten that one cannot tell when he is violating "them? If the rule contended for here is to be "applied to the defendant, he will be put upon "trial for an act which he could not by perusing "the law have ascertained was an offense."

In U. S. *vs.* Chase, 135 U. S., 255, 261, it is said:—

"Another argument on which indictments of "this character have been sustained by some of "the Circuit Courts is, that a reasonable construc- "tion must be given the statute, and, it being evi- "dent that Congress intended to exclude anything "of an obscene character from the mails, it is im- "material whether the thing prohibited is inside "or outside of an envelope, and therefore unreason- "able to hold that Congress intended not to allow "a decent writing in an obscene envelope, but at "the same time to allow obscene writing in a proper "envelope. We recognize the value of the rule "of construing statutes with reference to the evil "they were designed to suppress as an important "aid in ascertaining the meaning of language in "them which is ambiguous and equally susceptible "of conflicting constructions. But this court has "repeatedly held that this rule does not apply to "instances which are not embraced in the lan- "guage employed in the statute, or implied from

"a fair interpretation of its context, even though "they may involve the same mischief which the "statute was designed to suppress. U. S. *vs.* Shel- "don, 2 Wheat., 119; U. S. *vs.* Wiltberger, 5 Wheat., "76, 95; U. S. *vs.* Morris, 14 Pet., 464, 475; U. S. "*vs.* Hartwell, 6 Wall., 385; U. S. *vs.* Reese, 92 "U. S., 214."

In U. S. *vs.* Wiltberger, *supra*, Chief Justice Marshall said:—

"The rule that penal laws are to be construed "strictly, is perhaps not much less old than con- "struction itself. It is founded on the tenderness "of the law for the rights of individuals; and on "the plain principle that the power of punishment "is vested in the legislative, not in the judical de- "partment. It is the legislature, not the court, "which is to define a crime, and ordain its punish- "ment. * * *

"To determine that a case is within the inten- "tion of a statute, its language must authorize us "to say so. It would be dangerous, indeed, to "carry the principle, that a case which is within "the reason and mischief of a statute, is within "its provisions, so far as to punish a crime not enu- "merated in the statute, because it is of equal atro- "city, or of kindred character, with those which "are enumerated. * * *

"We can conceive no reason why other crimes "which are not comprehended in this act, should "not be punished. But Congress has not made "them punishable, and this court cannot enlarge "the statute."

In U. S. *vs.* Goldenberg, 108 U. S., 102, Mr. Justice Brewer said:—

"The primary and general rule of statutory con- "struction is that the intent of the lawmaker is to "be found in the language that he has used. He "is presumed to know the meaning of words and "the rules of grammar. The courts have no func- "tion of legislation, and simply seek to ascertain

"the will of the legislator. It is true there are "cases in which the letter of the statute is not "deemed controlling, but the cases are few and exceptional, and only arise when there are cogent "reasons for believing that the letter does not fully "and accurately disclose the intent. No mere "omission, no mere failure to provide for contingencies, which it may seem wise to have specifically "provided for, justify any judicial addition to the "language of the statute."

In Sarlls *vs.* U. S., 152 U. S., 570, 575, it was said:—

"Nor can courts, in construing penal statutes, "safely disregard the popular signification of the "terms employed, in order to bring acts, otherwise "lawful, within the effect of such statutes, because "of a supposed public policy or purpose."

If this court is embarrassed as to the true meaning of the Act, it will not legislate, but will content itself with a discharge of its duty of construction. If the work of the legislature is incomplete, a crime cannot be fastened upon one who has done, innocently, something not clearly defined as criminal. It was the duty of Congress to put its intent in unequivocal language, and if its intent was to itself unknown, and was expressed in such language as, naturally would be used because thereof—language vague and indefinite—there can be no conviction.

An act not made criminal, cannot be condemned, because it may seem equally evil, perhaps more, evil, than the one made criminal.

That Congress had no clearly-defined understanding of the nature of the misdemeanor at which it struck, is evidenced by what was said in the final debate in the House of Representatives, after the passage of the bill by the Senate, and after its consideration by the Judiciary Committee of the House. Mr. Culberson, of that committee, who had charge of it, said:—

"Now, just what contracts, what combinations in "the forms of costs, or what conspiracies will be in

"restraint of the trade or commerce mentioned "in the bill, will not be known until the courts have "construed and interpreted this provision. * * * "I wish to be understood, Mr. Speaker, as having "stated in the outset that I do not know, nor can "any man know, just what contracts will be em- "braced by this section (section 1) of the bill until "the courts determine."

During the course of the same debate, Mr. Cannon said:—

"Gentlemen say they do not know how the courts "will construe the Act. It is for us to enact the "law and for the courts to construe and enforce it. "If we do our duty, it is reasonable to believe that "the co-ordinate branch of the Government will do "its duty."

The fact that controlling interests in shares of non-competitive, as well as of competitive, railroads, were held by a single person or corporation, and that such holdings, from time to time, were being constantly acquired, was one which could not have been unknown to Congress. If ownership by one person, or corporation, of a controlling interest in competitive railroads, was intended to be made criminal, the fact could, and would, have been expressed in language unmistakable. It cannot be successfully contended that such ownership at the time, 1890, of the passage of the Sherman Act was understood to constitute a contract, combination in the form of trust or otherwise, or conspiracy, "in restraint of trade or commerce"; or as constituting a monopolization, or attempt at monopolization, or as a combination or conspiracy to monopolize, "any part of the trade or commerce among the "several States." Had the question, at that time, been put to any jurist or legislator, whether such ownership constituted a contract, combination, conspiracy or monopolization, of that character, the answer, unquestionably, would have been in the negative. It would be legislation, not adjudication, to put upon words which

imported no such meaning, an interpretation which would strike down, as criminal, such ownership.

The bill which was filed in the Circuit Court of the United States was apparently drafted with no thought, on the part of the representatives of the United States, that because of such ownership alone, there was a right to enjoin its continuance, or to render it valueless by depriving the owners of the voting power and of dividends. Concerning Messrs. Hill, Morgan and others (Record, vol. I., page 7*a*), it was charged thus:—

> "Hill, Morgan and others owning or controlling "a majority of the stock of that corporation, acting "for themselves as such stockholders and on behalf "of the said railway companies in which they owned "or held a controlling interest, on and prior to the "thirteenth day of November, 1901, contriving and in- "tending unlawfully to restrain the trade or commerce "among the several States and between said States "and foreign countries carried on by the Northern "Pacific and Great Northern systems, and con- "triving and intending unlawfully to monopolize "or attempt to monopolize such trade or commerce, "and contriving and intending unlawfully to re- "strain and prevent competition among said rail- "way systems in respect to such interstate and for- "eign trade or commerce, and contriving and in- "tending unlawfully to deprive the public of the "facilities and advantages in the carrying on of "such interstate and foreign trade or commerce "theretofore enjoyed through the independent com- "petition of said railway systems, entered into an "unlawful combination or conspiracy to effect a vir- "tual consolidation of the Northern Pacific and "Great Northern systems, and to place restraint "upon all competitive interstate and foreign trade "or commerce carried on by them, and to monop- "olize or attempt to monopolize the same, and to "suppress the competition theretofore existing be- "tween said railway systems in said interstate and "foreign trade or commerce, through the instru- "mentality and by the means following, to wit: A "holding corporation, to be called the Northern

"Securities Company, was to be formed under the laws "of New Jersey, with a capital stock of $400,000,- "000, to which, in exchange for its own capital stock "upon a certain basis and at a certain rate, was to "be turned over and transferred the capital stock, "or a controlling interest in the capital stock, of "each of the defendant railway companies, with "power in the holding corporation to vote such "stock and in all respects to act as the owner thereof, "and to do whatever it might deem necessary to aid "in any manner such railway companies or enhance "the value of their stocks. In this manner, the in- "dividual stockholders of these two independent "and competing railway companies were to be elimi- "nated and a single common stockholder, the North- "ern Securities Company, was to be substituted; "the interest of the individual stockholders in the "property and franchises of the two railway com- "panies was to terminate, being thus converted into "an interest in the property and franchises of the "Northern Securities Company. The individual "stockholders of the Northern Pacific Railway Com- "pany were no longer to hold an interest in the prop- "erty or draw their dividends from the earnings "of the Northern Pacific system, and the individual "stockholders of the Great Northern Railway Com- "pany were no longer to hold an interest in the prop- "erty or draw their dividends from the earnings "of the Great Northern system, but having ceased "to be stockholders in the railway companies and "having become stockholders in the holding corpo- "ration, both were to draw their dividends from "the earnings of both systems, collected and distri- "buted by the holding corporation. In this man- "ner, by making the stockholders of each system "jointly interested in both systems, and by practi- "cally pooling the earnings of both systems for the "benefit of the former stockholders of each, and by "vesting the selection of the directors and officers "of each system in a common body, to wit, the hold- "ing corporation, with not only the power but the "duty to pursue a policy which would promote the "interests, not of one system at the expense of the

"other, but of both at the expense of the public, "all inducement for competition between the two "systems was to be removed, a virtual consolida- "tion effected, and a monopoly of the interstate "and foreign commerce formerly carried on by the "two systems as independent competitors estab- "lished."

We have endeavored to show that there was no intent, unlawfully or otherwise, to restrain, or to monopolize, trade and commerce among the several States; and that there was no contrivance, unlawfully, or otherwise, to restrain competition in respect of interstate and foreign trade, or to deprive the public of facilities and advantages resulting from competition. We have further endeavored to show there was no plan, combination, or agreement, to turn over "a controlling interest in the capital stock of "each of the defendant railway companies" to a holding corporation. It is hardly necessary to endeavor to show there was no "pooling the earnings" of both systems. Each railway company collected and distributed, amongst its creditors, and stockholders, its freight and other receipts.

The relief prayed for was, an injunction, restraining the Northern Securities Company from acting as the owner of any of the shares of the capital stock of either the Northern Pacific or of the Great Northern, and restraining the Northern Pacific and the Great Northern, respectively, from permitting such vote to be cast. A decree was asked to the effect that each stockholder of the Railway Company who had exchanged his stock for that of the Northern Securities Company, should be enjoined from voting, or acting as the owner of, any of the stock of the Northern Securities Company thus exchanged. A mandatory injunction was asked for, requiring each stockholder of the Northern Securities Company to surrender his stock therein, and to accept in its place the stock of the defendant Railway Company which had been exchanged therefor.

It was obviously impossible to decree that there should

be a cancellation of any transaction of exchange, if any exchange had been made, and a redelivery of the shares of stock purchased by the Northern Securities Company, in the probably numerous instances in which its shares had been sold by the recipient.

The court below decreed (1) that the defendants had entered into a combination or conspiracy in restraint of trade; (2) that all the shares of stock of the two railway companies had been acquired, and were held, in virtue of such combination or conspiracy; (3) that the Northern Securities Company should be enjoined from acquiring further stock of either of said railway companies; (4) that it should be enjoined from voting any shares of stock at any meeting of stockholders of either railway company; (5) that the respective railway companies should be enjoined from permitting the stock to be voted; and (6) that they should be enjoined from paying any dividends to the Northern Securities Company.

In the court below it was argued, by the very able counsel for the United States, that "under this Act it "is only necessary to show that the defendants have ac- "quired the POWER to monopolize or restrain trade." He pressed the point in these words:—

> "I want to make this point as clear and as decided "as I can, because in my judgment this is one of "the controlling positions in the case. If your "Honors will allow me to say so, I don't have the "slightest doubt as to its correctness. And that "point is this: it is *a question of the possession of the "power*, and not a question of the *exercise of the "power to monopolize*, and no *overt* act in the exercise "of the power that the monopoly gives need be "shown. In fact in nearly all these cases there "was no overt act at all. Let me state it again, "so your Honors will get my thought: to create a "monopoly or an attempt to monopolize or a con- "spiring to monopolize, it is not necessary to show "that the person or corporation that monopolized "or attempted to monopolize or combined to "monopolize ever exercised the *power* that was gained.

"The offense which the law forbids *is the obtaining* "*of the power.* * * * And I press it again "now that it is a question of *the possession of the* "*power*, and if you prove that the things that the "man has done or the corporation has done give him "or it *the possession of the power* as applied to inter- "state railways to increase freight rates, to stifle "or cripple competition, you have then proven a "violation of the anti-trust law."

Triumphantly, with interpolated italics, he quoted these words, uttered by this court in Addyston Pipe & Steel Company *vs.* U. S., 237:—

"Again all the authorities agree that in order "to vitiate a contract or combination, *it is not* "*essential that its result* should be a complete monop- "oly; it is sufficient if it *really tends to that end* and "to deprive the public of the advantages which flow "from free competition."

This quotation, however, was from what was said by this court with reference to a contract or combination actually in restraint of trade, one which, by its provisions, directly restrained it. Under such circumstances, this court necessarily said, such restraint having been made a misdemeanor, that it was not essential its result should be a complete monopoly or that it did more than tend to that end. It said nothing, however, to the effect that the posession of a power to restrain trade, resulting from a combination, or contract, to restrain it, was criminally reprehensible if not exercised.

The court below, in these words, declined to consider the question of the intent:—

"Relative to the third contention, which has been "pressed with great zeal and ability, this may be "said: It may be that such a virtual consolidation "of parallel and competing lines of railroad as has "been effected, taking a broad view of the situa- "tion, is beneficial to the public rather than harm- "ful. It may be that the motives which inspired

"the combination by which this end was accom-
"plished were wholly laudable and unselfish; that the
"combination was formed by the individual defend-
"ants to protect great interests which had been
"committed to their charge; or it may be that the
"combination was the initial and a necessary step
"in the accomplishment of great designs which if
"carried out as they were conceived would prove to
"be of inestimable value to the communities which
"these roads serve and to the country at large.

"We shall neither affirm nor deny either of these
"propositions because they present issues which we
"are not called upon to determine, and some of them
"involve questions which are not within the prov-
"ince of any court to decide, involving as they do,
"questions of public policy which Congress must
"determine. It is our duty to ascertain whether
"the proof discloses a combination in direct restraint
"of interstate commerce—that is to say, a combina-
"tion whereby the power has been acquired to sup-
"press competition between two or more competing
"and parallel lines of railroad engaged in interstate
"commerce. If it does disclose such a combina-
"tion, and we have little hesitation in answering
"this question in the affirmative, then the anti-trust
"act, as it has been heretofore interpreted by the
"court of last resort, has been violated and the Gov-
"ernment is entitled to a decree."

It will be observed that the Circuit Court adopted the theory of the learned counsel for the United States, and held that it was not necessary to prove there had been a combination in restraint of interstate commerce; but simply that there had been one "whereby the power has "been acquired to suppress competition." It did not think it necessary, as a prerequisite to a condemnation of the combination, that it should be found to be one in restraint of trade; but determined that a combination, no matter whether it was, or was not, in restraint of trade, which conferred a *power* to restrain it, came within the ban of the Act. In further elaboration of this thought it said:—

"It is pertinent, therefore, to inquire in what "way the existing combination that has been formed "does affect interstate commerce. It affects it, we "think, by giving to a single corporate entity, or "more accurately, to a few men acting in concert "and in its name and under cover of its charter, "the power to control *all the means of transpor-* "*tation* that are owned by two competing and "parallel railroads engaged in interstate commerce."

The present brief is filed on behalf of the Northern Securities Company, which holds property—shares of stock—created under the laws of one of the States, for which it has paid full value, which cannot be returned to the vendors, because they have probably parted with the consideration they received. It acquired its property with no intention to do anything illegal. The crime with which it is charged is, that it continued to purchase shares of the Great Northern, after it had taken from the alleged conspirators the twenty-seven per centum of the stock of that company, over which, alone, they had control. The punishment inflicted is a practical forfeiture of its right to *all* the shares, by denying to it the voting power thereof and all right to the dividends thereon.

Unless there was a conspiracy by Messrs. Hill, Morgan and their friends, to do something violative of the Sherman Act, the only act violative of the same which could have been done, must have been done by the Northern Securities Company.

We have endeavored to show that all the so-called conspirators did, was to arrange for, or to acquiesce in, the formation of a company which would acquire, though they did not bind themselves to sell, after its formation, their own shares, which constituted a majority of the Northern Pacific stock, and about twenty-seven per centum of that of the Great Northern. We have further endeavored to show that they desired and expected, by such formation, to create and extend, not to restrain, trade, their purpose being to insure such creation and extension by protecting the ownership of such shares against raids by those having hostile interests and intents.

Even though they had intended that the company to be formed should acquire a controlling interest in the stock of both railways, they would not, by their action, have violated the Sherman Act, unless a holding by a corporation, of such interest, is in violation thereof. If one corporation may hold a controlling interest in two competing railway companies, it cannot be illegal to form a corporation intended to hold such interest. An agreement to do what is lawful, cannot be construed into a criminal conspiracy.

The theory of the United States was, that certain persons conspired to restrain trade, and that in furtherance of the conspiracy, they formed a corporation to acquire shares which, if thus acquired, would enable it thereafter to violate the Sherman Act by restraining trade. The allegations of the bill, however, that there was an intention to restrain, or in any way injuriously to affect, trade, were not sustained by a *scintilla* of evidence. The burden of proof of such intention was upon those who alleged it, inasmuch as the overt act, the formation of the company and the acquisition of the shares, even of a controlling interest in the shares, of both railways, was not one which, of itself, affected trade. The formation of the company so far as it can be said to affect trade, was for the purpose of its protection, with an intent to enlarge it. If, therefore, the acquisition by the company, when formed, of the shares, was legal, unless resulting from an illegal intent, the theory of the Government, under the testimony, failed. An acquisition of the majority of the shares of competitive railway companies does not, of itself, restrain trade. An agreement to acquire such ownership, therefore, is not, of itself, an agreement in restraint of trade. We may concede that, in consequence of such acquisition, power is vested in the owners to restrain it, without conceding that if the power be not exercised, there will be such restraint. Whatever criminality may attach to the ownership, will attach, not because of the ownership, but because of the subsequent doing of a criminal act. It is within the power of nearly all persons to commit a crime;

but they are punished, not because they may, but when they do, commit it.

Unless the ownership of the majority of shares of two competing railway companies is a contract, combination, in the form of trust or otherwise, or a conspiracy, in restraint of interstate or international trade or commerce, or is a monopolization or attempt at monopolization, or a combination or conspiracy with other persons, to monopolize, some part of such trade and commerce, the Northern Securities Company has done no wrong. In our denial that it has violated the Sherman Act, we will argue seven propositions.

I. THE PURCHASE BY A PERSON OR CORPORATION, OF A MAJORITY OF THE SHARES OF TWO COMPETING RAILWAY COMPANIES, IS NOT "A CONTRACT, COMBINATION IN "THE FORM OF A TRUST OR OTHERWISE, OR CONSPIRACY "IN RESTRAINT OF TRADE OR COMMERCE AMONG THE SEV-"ERAL STATES."

II. THE HOLDING BY A PERSON OR CORPORATION, AS OWNER, OF A MAJORITY OF THE SHARES OF TWO COMPETING RAILWAY COMPANIES, IS NOT "A CONTRACT, "COMBINATION IN THE FORM OF A TRUST OR OTHERWISE, "OR CONSPIRACY IN RESTRAINT OF TRADE OR COMMERCE "AMONG THE SEVERAL STATES."

III. A CORPORATION, THOUGH INCORPORATED FOR THE PURPOSE OF HOLDING, AND ACTUALLY HOLDING, A MAJORITY OF THE SHARES OF TWO COMPETING RAILWAY COMPANIES, IS NOT "A COMBINATION OR CONSPIRACY IN "RESTRAINT OF TRADE OR COMMERCE AMONG THE SEV-"ERAL STATES."

IV. A PERSON OR CORPORATION, BY PURCHASING A MAJORITY OF THE SHARES OF TWO COMPETING RAILWAY CORPORATIONS, DOES NOT MONOPOLIZE OR ATTEMPT TO MONOPOLIZE "ANY PART OF THE TRADE OR COMMERCE "AMONG THE SEVERAL STATES."

V. A PERSON OR CORPORATION BY HOLDING, AS OWNER, A MAJORITY OF THE SHARES OF TWO COMPETING RAILWAY COMPANIES, DOES NOT MONOPOLIZE, OR ATTEMPT TO MONOPOLIZE, "ANY PART OF THE TRADE OR COMMERCE "AMONG THE SEVERAL STATES."

VI. THE POWER OF CONGRESS TO REGULATE COMMERCE, DOES NOT CONFER UPON IT A RIGHT TO PRESCRIBE THE PERSONS WHO MAY ENGAGE THEREIN, OR TO CONTROL THE OWNERSHIP OF SHARES OF STOCKS OF CORPORATIONS WHO ENGAGE THEREIN.

VII. THE RELIEF DECREED, WAS IMPROPER, UNDER ANY ASPECT OF THE CASE.

**I. The purchase by a person or corporation, of a majority of the shares of two competing railway companies, is not "a contract, combination in the "form of a trust or otherwise, or conspiracy, in re-"straint of trade or commerce among the several "States."**

The Sherman Act, by its first section, prohibits and punishes three things, (1) a contract in restraint of trade; (2) a combination in the form of trust or otherwise in restraint of trade; and (3) a conspiracy in restraint of trade.

It will hardly be contended that the purchase by a person or corporation, of a controlling interest in shares, is "a contract in restraint of trade or commerce," even though the vendor intends to vest in the vendee such controlling interest, and the vendee intends to acquire the same. In the present case, as we have endeavored to show, there was no such intent on the part of the vendor, and there was, therefore, no mutuality of intention to vest a controlling interest.

A purchase, such as we have stated, is a contract in no way connected with trade or commerce. Neither the vendor nor the vendee is engaged therein. The transfer of shares does not enable the vendee to do so. The pro-

hibition of the Act is not against a contract of purchase and sale of shares; but against one in restraint of trade and commerce. The contract prohibited must be one which itself, as in the case of the Trans-Missouri and Addyston contracts, restrains trade and commerce. In the former case, there was a contract, by different corporations engaged in transportation, not to carry, except at mutually agreed upon rates, and not to do other things in the way of transportation, excepting in accordance with mutual arrangement. Each Company restricted itself in the exercise of its duty to carry. The contract condemned by this court was not one which depended for its illegality, upon something thereafter to be done. The criminality resulted from the agreement itself. In the Addyston case, the contract condemned, was one by which the parties thereto agreed to restrict their interstate trade.

The Sherman Act prohibits, not a contract *tending* to restrain trade, but one in restraint thereof, *i. e.*, one by which trade is restrained.

In the present case, the United States claims, as a result of the contract of purchase of a controlling interest in the shares of two competing railway companies, that there will be a tendency, on the part of the owner, thereafter, toward such action as will bring about a restraint of trade. The contract, itself, however, so far as it involves the purchase and sale of shares, is not one in restraint of trade. There is no agreement to do anything which restrains it.

The contract is made with no reference to trade or commerce, or the restraint thereof. The vendor desires to sell what the vendee desires to purchase. With the consummation of the sale, the contract is at an end. If the object of the vendee, in purchasing the shares, is the acquisition of a power to restrain competition, it is not accomplished by any contract "in restraint of trade." In the present case, as we have endeavored to show, the purchase was with an entirely different object.

We submit, therefore, that in purchasing the shares, the Northern Securities Company entered into no "con-"tract in restraint of trade."

Such purchase can, with even less propriety, be spoken of as "a combination in the form of trust or otherwise in "restraint of trade."

The sale by the former owners of the shares was not a "combination." Even if it be contended that they combined to sell, which contention cannot be made as to a controlling interest in the Great Northern shares, such combination was not one in restraint of trade; but was simply for a purpose not illegal, viz., to sell. A vendor and a vendee who agree upon a sale and purchase of shares may, in one sense, be said to combine for the purpose; but the purpose for which they combine is to make a transaction which ends with the delivery of, and payment for, the shares, and involves in it nothing in the way of restraint of trade or commerce.

The purchase by the corporation of such shares cannot be held to be "a conspiracy in restraint of trade." It is not a "conspiracy" in any sense, much less one to restrain trade. If the transaction of purchase and sale of such controlling interest in such shares can possibly be spoken of as "a conspiracy," it can be said to be nothing more than "a conspiracy" to do an act which certainly is not illegal unless there be something more in it than a transfer of title. In the present case, whatever "con-"spiracy" there was, consisted in one by persons, not owning the controlling interest in both companies, to sell. There was nothing which, under any aspect of the case, can be spoken of as "a conspiracy," on the part of the owners of Great Northern shares, who, after the sale by the so-called conspirators, transferred their shares, over which the conspirators never had control, to the Northern Securities Company. These owners meant to do nothing more than to sell, for a price accepted by them as an equivalent.

There can be no difference in the effect upon trade and commerce, of an acquisition of such controlling interest in shares by a person, or by a corporation, by a corporation already in existence, or by one specially brought into existence for the purpose of buying. If it is a misdemeanor, by such acquisition, to obtain the power to sup-

press competition, the competition will be equally suppressed whether the holding be by a single person, or by a partnership, or by a trustee, or by a corporation theretofore engaged in business, or by a corporation coming into existence thereafter. It is to the last degree improbable, therefore, that the acquisition of ownership was within the meaning of Congress when it enacted the first section of the Act. It is made a misdemeanor punishable in the way provided, in the case of "every *person* who shall make "any such contract or engage in any such combination or "conspiracy."

If a *person* purchases a controlling interest in shares of competitive railway companies he cannot, by the wildest stretch of imagination, be spoken of, in making such purchase, as one who contracts, combines or conspires "in re- "straint of trade or commerce." In the case of a single person, making the acquisition, there is no combination to purchase. In like manner, when a corporation purchases, there is no such combination. If the real theory of a corporation be disregarded, and if it be treated as an association of persons who, being combined as an association, actually make the purchase, yet there is no combination amongst them to do anything more than to make a contract to acquire title. In the act of purchase, neither a corporation, nor a person, can be spoken of as a "combina- "tion in the form of trust or otherwise, in restraint of "trade."

A single person, in acquiring the title, makes no contract with any one except the vendor, and of course cannot, in making the acquisition, be a conspirator.

By the eighth section, it is provided that the word "person" or "persons," wherever used in the Act, shall be deemed to include "corporations and associations." Whatever, therefore, may be done under this section by a person, may also be done by a corporation.

Whilst conceding the contention of the United States, that if the thing done is prohibited as a misdemeanor by the Act, goodness of motive cannot condone, we contend that where what is done is simply a purchase of shares of

stock, an act not of itself a restraint of trade, if it be sought to vitiate the transaction because done with an intent thereby to restrain trade, the burden of proof is upon those making such effort. Wherever this court has dealt with the subject, it has said with emphasis, that the restraint of trade which is illegal, whether made by "con-"tract, combination or conspiracy," is one which directly restrains trade, not one which does so indirectly, or may bring about a state of affairs under which a restriction of trade may result.

In the Sugar Refining case, it was conceded by this court, as a result of the acts complained of by the Government, that the volume of interstate trade and commerce might be diminished; but inasmuch as what was actually done did not directly restrain trade, it was held the Act had no application.

The meaning of the words, "contracts in restraint of "trade," was thoroughly understood in jurisprudence, and in business, when the Sherman Act was passed. A contract of purchase of shares of stock of trading or transportation companies, whether by a single individual or by a combination, had never been held by any court, or supposed by any person, to be "a contract or combina-"tion in restraint of trade." It was not the intention of Congress, as this court has said, to create any new offense. Whilst in the Trans-Missouri case, this court held that the Act punished all contracts "in restraint of trade," whether reasonable, or unreasonable, it manifested no intention to enlarge the meaning of the words. At common law, and it was the common law "in restraint of "trade," which was within the contemplation of Congress, an ownership of all the property, or of all the shares, of a transportation company, or of competing transportation companies, was never alluded to as "a contract in restraint "of trade."

As was said by Mr. Justice Peckham in United States *vs.* Freight Association, 166 U. S., 328:—

> "Contracts in restraint of trade have been known "and spoken of for hundreds of years both in

"England and in this country, and the term includes "all kinds of those contracts which in fact restrain "or may restrain trade."

A purchase of shares of stock, or of other personal property, even with an ulterior purpose, much less a purchase without ulterior purpose, has never been alluded to by jurists, as a restraint of trade.

If there was an illegal conspiracy, as the result of which the company acquired the shares, then the conspirators must be punished; but the corporation which bought and paid therefor, in which persons are interested as shareholders, who took no part in the conspiracy, cannot be deprived of its title.

It is argued by the United States that the purchase of the shares was with a motive to destroy competition, and that by reason of the purchase a power thus to destroy was acquired.

The motive as established by the testimony was not one to destroy competition. The acquisition of power, however, is not punished by the Act. The actual contracting, or combining, to do something which restrains trade and commerce, alone was prohibited.

**II. The holding by a person or corporation, as owner, of a majority of the shares of two competing railway companies, is not "a contract, combi- "nation in the form of a trust or otherwise, or con- "spiracy, in restraint of trade or commerce among "the several States."**

If the purchase by a corporation, of the controlling interest in the shares of two competitive railway companies is not a contract, combination or conspiracy in restraint of trade, the holding of such shares cannot be decided to be such contract, combination or conspiracy. Concerning the holding by a person, of such controlling interest, it cannot be said that it is a contract, combination or conspiracy. A person may build two parallel lines which would be competitive if owned by different persons; or he may acquire

the ownership of the shares of competitive lines. Is his holding under such, or under any, circumstances, a contract, or a combination, or a conspiracy? In holding, he contracts with nobody; combines with nobody; conspires with nobody. As we have endeavored to show, persons and corporations are dealt alike with by the Act. Such is the express direction of its eighth section.

In arriving, therefore, at the meaning of Congress, we must deal with the subject in such way as to arrive at one which will be equally applicable in the case of a single person or of a corporation, there being no discrimination by the Act as to what may be done by either, and there being no difference in the result, whether the acquisition be by one or by the other.

If it be the holding of the controlling interest in the shares of two competing railway companies, which is prohibited by the first section, then an ownership acquired antecedently to the passage of the Act is prohibited equally with one acquired subsequently, inasmuch as the Section does not deal with something done after the passage of the Act, but with all contracts, combinations or conspiracies in restraint of trade no matter when formed. The continuing to hold, after the passage of the Act, by a corporation which acquired its shares prior thereto, if the holding be a contract, combination, or conspiracy, violates the Act equally, and is equally within its words, with a holding by a corporation of shares acquired by it thereafter. The imagination, however, can hardly conceive of an intent by Congress such as would make criminal a continued exercise by a corporation of its right over property originally acquired in accordance with law.

**III. A corporation, though incorporated for the purpose of holding, and actually holding, a majority of the shares of two competing railway companies, is not "a combination or conspiracy in re- "straint of trade or commerce among the several "States."**

We have endeavored to show that there is no prohibition of a holding by a person, of the majority of the shares of

stock of competing railway companies. If this be so, how can the association together under any form, by persons who mean to do through the association nothing more than can be done by an individual, be treated as a misdemeanor? If the holding of such majority of shares is illegal, the association for the purpose of holding will also be illegal. The converse of the proposition is equally true. There may be an association of persons for the purpose of restraining trade; but the formation of a corporation to hold shares, if a holding in one control is not illegal, cannot be held as such.

The utmost which can be claimed by the Government is, that the Northern Securities is an association of individuals, jointly interested in its corporate property, having for their purpose the destruction of all motive for continued competition amongst the railroad companies.

We have endeavored to show that neither the destruction of competition, nor the restraint of trade, was contemplated by the persons who were instrumental in bringing about the incorporation. It cannot, therefore, be said, with truth, that the purpose of the association was to do something different from what is established by the uncontradicted testimony.

We have sought to present, as clearly as possible, the fact that the restraint of trade which is forbidden, is a direct one, not an indirect resultant of a contract, or combination, for some other purpose.

The necessary result of the acquisition of the majority of the shares, was the right to cast a majority vote at meetings of stockholders. This was the direct purpose of the agreement to incorporate and of the incorporation itself. If, as the result of this, the desire to compete was lessened, such lessening of desire was not a restraint of trade. The person who owns a property is not obliged to enter into competition with others. His declination so to do cannot be held an offense against any law. It did not follow, inevitably, that there would be any less desire by the two railway companies to compete after

the majority of their shares had been acquired by the corporation. They might find it important to reduce rates, to give increased facilities, and to do everything which would be suggested by the most ardent desire to compete, in order to acquire for each respectively, a great interstate and international transportation, in the conduct of which they were in competition with, say, the Canadian Pacific and the Union Pacific Railroad Companies. They might desire to protect an alliance which, with greater economy, would enable commerce to be done cheaper and better.

If the incorporation and acquisition of shares by the corporation did not necessarily restrain trade, because it did not directly deal therewith, could such incorporation and acquisition be held illegal because one of the ordinary results of the acquisition of property—a right to vote—would affect, in consequence of which trade might be enlarged, or might be diminished. An intent to restrain trade could not be deduced from an association or incorporation which, because of something thereafter occurring, might, indirectly, affect trade injuriously or beneficially.

In the Sugar Refining case, the result of the ownership, of the shares of practically all the manufactories which refined sugar, an article of commerce usually transported on a large scale, might well have been to diminish the desire to compete, to raise prices, and, as a consequence, to diminish the demand and amount of interstate trade and commerce in sugar. This court, however, held that it was only with the restraint of interstate trade and commerce that the Sherman Act dealt; and that it inflicted no penalty for the doing of any act not directly restraining such trade and commerce, whatever might be the indirect effect.

If the legality or illegality of an act depends, either upon its being done with or without an intent to restrain trade, or upon a subsequent restraining of trade because of a desire engendered by such act, a misdemeanor will not be committed in absence of proof of the existence of the intent, or of the subsequent wrongful act.

A "restraint of trade" may result from an agreement to restrain, or from an actual restraint. In the case of the Northern Securities Company there was neither agreement to restrain, intent to restrain, nor actual restraint.

Two persons, or corporations, owning competing properties, engaged in interstate trade or commerce, will not be permitted to agree not to compete inasmuch as such agreement is a contract in restraint of trade; but, if the managers of each find it not advisable to compete because of self interest, and, because of such self interest, do not compete, they are not within the prohibition of the Sherman Act.

If therefore the properties of both be acquired by a third corporation, there can be no illegality in such acquisition because, thereafter, self interest, not coupled with any agrement, may bring about non-competition.

In the Addyston case, if one person, or corporation, had purchased all the properties belonging to the different parties to the illegal agreement, such purchase would not have been illegal; nor would the subsequent management of the business under one ownership have been a violation of the Act.

We have endeavored to show that there is no prohibition, by the first section, of the acquisition of the controlling interests in shares of companies engaged in competition. In case of such acquisition by one person, or by a partnership, a desire to compete would disappear as completely as in the case of a similar acquisition by a corporation. Take the case of several persons or corporations engaged in interstate trade, in articles manufactured by themselves. An agreement regulating prices and agreeing not to compete in such manufacture and sale, would be, as was settled by the Addyston case, illegal. An acquisition of all the properties would not be illegal. In case of an original construction of every manufactory by one person, his ownership of them would not be held illegal. If they could be built, why could they not be bought, by a single person? There is no prohibition of ownership on a large, not even on the most immense, scale.

It may be said, and it has been said, that a corporation might be formed, if the argument of the appellants is sound, large enough to include a holding of a controlling interest in all the shares, of all the competing railway companies of the country. The statement of this possibility is supposed to carry with it a demonstration of the unsoundness of the position assumed by the appellants.

In the Pearsall case, 161 U. S., 646, this court, speaking through Mr. Justice Brown, said:—

> "Doubtless these stockholders could lawfully acquire by individual purchases a majority, or even the whole of the stock of the re-organized company, and thus possibly obtain its ultimate control; but the companies would still remain separate corporations with no interest, as such, in common. This, though possibly, would not be altogether feasible, and would require considerable time for its accomplishment."

It was not thought by this court that the indirect control of corporations, which would result from the ownership of a majority of shares, was illegal. If not illegal in the case of an individual, it cannot be such in the case of several individuals acting together; nor in the case of a corporation.

With the States which bring the corporations into existence, must rest the remedy, by restricting the acquisition by one owner, of competing railways, or by one or more owners, of a majority of the shares of competing railways. If the United States should incorporate companies to build interstate railways, it would be competent for it to restrict their magnitude, or their right of acquisition. It has no such power, however, over corporations not by it created.

This court, through Mr. Justice Peckham, in United States *vs.* Joint Traffic Association, 171 U. S., 567, speaking of the application of the Sherman Act, said that it did not apply to the "formation of a corporation "to carry on any particular line of business by those

"already engaged therein; a contract of partnership or "of employment between two persons previously engaged "in the same line of business." He added:—

> "The formation of corporations for business or "manufacturing purposes has never, to our knowl- "edge, been regarded in the nature of a contract in "restraint of trade or commerce. The same may "be said of the contract of partnership."

If a corporation has a power, conferred upon it by the State which incorporates it, to acquire competitive properties, or the shares of competing companies, such acquisition is prohibited by nothing in the Sherman Act. The formation of a corporation for such purpose, is not within its prohibitions.

In what we have been saying under this head, we have dealt with the corporation as though it were an association, or combination, of individuals. Such, however, is not the true theory of corporate existence. The corporation is a legal entity. The property which it owns belongs not to the individuals, but to the corporation itself. The management is not by the individuals, but by the corporation, which acts, in most cases, through a board of directors.

**IV. A person or corporation, by purchasing a majority of the shares of two competing railway companies, does not monopolize, or attempt to monopolize, "any part of the trade or commerce "among the several States."**

In seeking for the true meaning of the second section of the Sherman Act, it is more easy to determine what is not a monopolization, or attempt at monopolization, than to determine what is such.

What is a monopoly, or a combination, or a conspiracy, to monopolize, can, to a certain extent, be ascertained by reference to text books and to decisions. Few jurists,

however, have ever attempted to define, with accuracy, the meaning. The idea of monopoly, however, involves something more than a mere acquisition of the whole, or of the major part, of a commodity, or of shares of stock. It involves the idea of exclusion of other supply, as well as of an inclusion of what is actually acquired.

To-day the whole, or the major part, of the whole, of a certain commodity may be acquired; but, in a day or two, there may be an unlimited addition to the supply. The acquisition of the existing supply, under such circumstances, could hardly be spoken of as a monopoly. If one company acquires all the existing railroads, but it is open to others to build additional ones, the acquisition does not amount to a monopoly. The party who monopolizes must acquire the present supply and contract for, or in some other way secure, by restraint, exclusion or otherwise, a limitation upon the future.

At any particular period of time there may be but two persons, or corporations, engaged in carriage by water between two different ports. The acquisition by one, of the ships and property of the other, will give no monopoly of such transportation because, to an indefinite extent, other ships may be put into the same trade.

At no time has the acquisition of all, of any particular commodity, been spoken of as a monopoly, even if such article be one consumed, as food. "Engrossing" is the name given by the text writers to such an acquisition. In the Senate of the United States, whose Judiciary Committee redrew and reported, the Act which was finally passed, Senators Hoar and Edmunds, speaking on behalf of that committee, explained its meaning.

Senator Kenna, having asked whether the word "monopolize" would apply to the case of one who, by skill and energy, had practically secured the whole trade in shorthorn cattle in this country, Senator Edmunds said:—

> "It is not intended by the committee, and the "bill does not do it. Anybody who knows the "meaning of the word 'monopoly' as the courts "apply it, would not apply it to such person at all, "and I am sure my friend must understand that."

The inquiry was followed up by Senator Hoar, who stated that the same question had been put by him in the committee. He said:—

> "But I was answered, and I think all the other "members of the committee agreed in the answer, "that 'monopoly' is a technical term known in the "common law. * * * I became satisfied that "they were right, and that the word 'monopoly' "has a clear and legal signification."

Senator Kenna then asked whether a "monopoly" as defined by Senator Hoar, was prohibited at common law, and having been answered by Senator Hoar that it was, put this question: "Then why should this bill proceed to "denounce this very monopoly?" Senator Hoar replied: "Because there is no common law of the United States."

In the course of the same debate, the same Senator said:—

> "We have affirmed the old doctrine of the com- "mon law in regard to all interstate and interna- "tional commercial transactions, and have clothed "the United States courts with authority to enforce "that doctrine by injunction. We have put in also "a grave penalty."

Senator Edmunds further said:—

> "We * * * thought that if we were really "in earnest in wishing to strike at these evils broadly "in the first instance as a new line of legislation, we "would frame a bill that should be clearly within "our constitutional power; that we should make its "definition out of terms that were well known to the "law already, and would leave it to the courts in the "first instance to say how far they could carry it "from its definitions as applicable to each particular "case as it might arise."

In speaking of the bill as it stood before it had been redrawn by the Judiciary Committee, Senator Sherman said:—

"It does not announce a new principle of law, but "applies old and well-recognized principles of the "common law to the complicated jurisdiction of "our State and Federal Government. Similar con- "tracts in any State in the Union are now by com- "mon or statute law null and void."

He further said:—

"It is said that this bill will interfere with lawful "trade and with the customary business of life. I "deny it. It aims only at unlawful combination."

And again:—

"It does not interfere with any lawful business "in the United States, whether conducted by a cor- "poration or a partnership or an individual; it deals "only with unlawful combinations, unlawful by the "code of any civilized nation of ancient or modern "times."

The acquisition of the whole or of any part, of any article of merchandise, or of shares of stock, in itself, is not a monopoly. Were it otherwise, all competition for trade and commerce would be illegal, because the underlying motive is a determination, by a presentation of temptations to buyers, or shippers, to monopolize the whole, or a part, of the same. Each competitor seeks to acquire for himself, the business which is being done by his rivals. If the definition of a monopoly, insisted upon by the United States, is correct, his success will make him punishable for a misdemeanor. Each railroad or transportation company, engaged in a competitive business, seeks, by offering superior facilities, by lower rates, and the like, to obtain for itself the whole of the commerce. By means of new discoveries and inventions applied to transportation or manufacturing, their possessor secures, if the United States is correct in its interpretation of the Act, what is a monopoly, and is prohibited. A monopoly, as understood by the Government, does not require the

elimination of competition. It exists wherever the whole, or any considerable part, of the trade or commerce, is done by one person or corporation. If all transportation in one locality is done by one railroad company, it possesses a monopoly. If all the shares of its stock are owned by one person, he monopolizes such shares. An acquisition of the majority of the shares of two competitive companies effects a monopoly to no greater extent than does the acquisition of the majority of the shares of one company which possesses all the means of transportation between certain points.

One of the best, if not the best, of the definitions of monopoly, is that given by the late Justice Jackson, *In re* Green, 52 Fed. Rep., 104. He said:—

> "It is not very clear what Congress meant by the "second section of the Act of July 2, 1890, in declaring "it a misdemeanor to monopolize, or 'attempt to mo-"'nopolize,' any part of the trade or commerce among "the States or with foreign nations. It is very certain "that Congress could not, and did not, by this enact-"ment, attempt to prescribe limits to the acquisition, "either by the private citizen or State corporation, "of property which might become the subject of in-"terstate commerce, or declare that, when the ac-"cumulation or control of property by legitimate "means and lawful methods reached such magnitude "or proportions as enabled the owner or owners to "control the traffic therein, or any part thereof, "among the States, a criminal offense was commit-"ted by such owner or owners. All persons, in-"dividually or in corporate organizations, carry-"ing on business avocations and enterprises involv-"ing the purchase, sale, or exchange of articles, or "the production and manufacture of commodities, "which form the subjects of commerce, will, in a "popular sense, monopolize both State and inter-"state traffic in such articles or commodities just in "proportion as the owner's business is increased, "enlarged, and developed. But the magnitude of a "party's business, production, or manufacture, with "the incidental and indirect powers thereby ac-

"quired, and with the purpose of regulating prices "and controlling interstate traffic in the articles or "commodities forming the subject of such business, "production, or manufacture, is not the monopoly, or "attempt to monopolize, which the statute condemns. "A 'monopoly', in the prohibited sense, involves the "element of an exclusive privilege or grant which "restrained others from the exercise of a right or lib-"erty which they had before the monopoly was se-"cured. In commercial law, it is the abuse of free "commerce, by which one or more individuals have "procured the advantage of selling alone or exclu-"sively all of a particular kind of merchandise "or commodity to the detriment of the public. "* * * It will be noticed that, in all the fore-"going definitions of 'monopoly,' there is embraced "two leading elements, viz., an exclusive right or "privilege, on the one side, and a restriction or re-"straint on the other, which will operate to prevent "the exercise of a right or liberty open to the public "before the monopoly was secured. This being, "as we think, the general meaning of the term, as "employed in the second section of the statute, an "'attempt to monopolize' any part of the trade or "commerce among the States must be an attempt "to secure or require an exclusive right in such trade "or commerce by means which prevent or restrain "others from engaging therein. It was certainly "not a 'monopoly,' in the legal sense of the term, "for the accused or the Distilling and Cattle Feeding "Company to own seventy distilleries, and the pro-"ducts thereof, whether such products amounted "to the whole or a large part of what was produced "in the country. Their ownership and control of "such products, as subjects of trade and commerce, "is not what the statute condemns, but the mo-"nopoly or attempt to monopolize the interstate "trade or commerce therein. In this acquisition "and operation of the seventy distilleries, which "enabled the accused or said Distilling and Cattle "Feeding Company to manufacture and control "the sale of seventy-five per cent. of the distillery "products of the country, it does not appear, nor

"is it alleged, that the persons from whom said dis-
"tilleries were acquired were placed under any re-
"straint, by contract or otherwise, which prevented
"them from continuing or re-engaging in such bus-
"iness. All other persons who chose to engage
"therein were at liberty to do so. The effort to
"control the production and manufacture of distil-
"lery products, by the enlargement and extension
"of business, was not an attempt to monopolize trade
"and commerce in such products within the mean-
"ing of the statute, and may therefore be left out
"of further consideration."

In Charles River Bridge *vs.* Warren Bridge, 11 Peters, 606, Mr. Justice Story, in his dissenting opinion, says:—

"There is great virtue in particular phrases; and
"when it is once suggested that a grant is of the
"nature or tendency of a monopoly, the mind almost
"instantaneously prepares itself to reject every
"construction which does not pare it down to the
"narrowest limits. It is an honest prejudice, which
"grew up in former times from the gross abuses of
"the royal prerogatives; to which, in America, there
"are no analogous authorities. But, what is a mo-
"nopoly, as understood in law? It is an exclusive
"right granted to a few, of something which was
"before of common right. Thus, a privilege granted
"by the king for the sole buying, selling, making,
"working, or using a thing, whereby the subject,
"in general, is restrained from that liberty of manu-
"facturing or trading, which before he had, is a
"monopoly; 4 Black. Comm., 159; Bac. Abridg.
"Prerogative, F. 4.

"My lord Coke, in his Pleas of the Crown; 3 Inst.,
"181; has given this very definition of a monopoly;
"and that definition was approved by Holt and
"Treby, (afterwards chief justices) of king's bench,
"*arguendo*, as counsel, in the great case of the East
"India Company *vs.* Sandys; 10 Howell, State
"Trials, 386. His words are, that a monopoly is
"'an institution by the king, by his grant, com-
"'mission, or otherwise, to any persons or corpora-

"'tions, of or for the sole buying, selling, making, "'working or using of everything, whereby any "'persons or corporations are sought to be re- "'strained of any freedom or liberty they had "'before, or hindered in their lawful trade.' So, "that it is not the case of a monopoly, if the sub- "jects had not the common right or liberty before "to do the act, or possess and enjoy the privilege or "franchise granted, as a common right; 10 Howell, "State Trials, 425. And it deserves an especial "remark, that this doctrine was an admitted con- "cession, pervading the entire arguments of the "counsel who opposed, as well as of those who "maintained the grant of the exclusive trade in the "case of the East India Company *vs.* Sandys, (10 "How. St. Tr. 386,) a case which constitutes, in a "great measure, the basis of this branch of the law."

In 20 American & English Encyclopedia of Law, 846, it is said:—

"A monopoly, in its strict sense, is an exclusive "right, granted by the State to a few, of something "which was before of common right. The term as "now understood is not confirmed to the above "limits, but embraces any combination the tendency "of which is to prevent competition in its broad and "general sense and to control prices to the detri- "ment of the public."

The monopoply consists, not so much in getting possession of the whole thing, but in destroying the right or ability of others to produce the same thing. Even though there be two competitive railroads, the acquisition by one owner, of both railroads, does not destroy competition. It is open to the United States to charter another corporation, and it is open to other individuals and to other corporations, to build additional railroads.

In Bouvier's Dictionary (Rawle's Edition, vol. II., page 435), monopoly is thus defined:—

"An institution or allowance by a grant from the "sovereign power of a State, by commission, letters

"patent, or otherwise, to any person or corporation, "by which the exclusive right of buying, selling, mak- "ing, working, or using anything is given. Bacon Abr. "Co.; 3rd Inst. 181. Whereby any person or persons, "bodies politic or corporate, are sought to be re- "strained of any freedom or liberty they had before, "or hindered in their lawful trade; 111 U. S., 754; "11 So. Rep. (La.) 239; 53 Fed. Rep. 452. Mo- "nopolies were, by stat. 21 Jac. I., c. 3, declared "illegal and void, subject to certain specified ex- "ceptions, such as patents in favor of the authors "of new inventions; 4 Bla. Com. 159; 2 Steph. "Com. 25. See *passim* For. Cas. and Op. 421; "Curtis, Robinson, Merwin, Walker; Patents."

Blackstone's Commentaries, Book IV., 159, thus defines monopoly:—

"Monopolies are much the same offence in other "branches of trade that engrossing is in provisions: "being a license or privilege allowed by the king for "the sole buying and selling, making, working, or "using of anything whatsoever; whereby the sub- "ject in general is restrained from that liberty of "manufacturing or trading which he had before."

In the Century Dictionary, monopoly is thus defined:—

"Specifically, in Eng. constitutional hist., and "hence sometimes in Amer. law, such an exclusive "privilege when granted by the crown or state to an "individual, association, or corporation, for the sake "of the pecuniary advantage of its exclusiveness. A "privilege not granted by the state, but secured by "buying up the article, is termed by the English "law *engrossing*. The legal objection to a monopoly, "in this sense of the word, is that it can be secured "only by forbidding all other citizens except the "favored grantee to exercise a common-law right. "Exclusive privileges granted by the state to a "limited number of persons for the sake of en- "abling the state the better to regulate the traffic "for the protection of the rest of the community,

"as in case of banking franchises, liquor traffic, etc., "are not deemed monopolies, although the same "privileges would be, if conferred on a single or a "very few grantees, for the sake of the pecuniary "benefit to them, so the exclusive privileges con- "ferred on inventors and authors, by the patent "and copyright laws, for the sake of the encourage- "ment of the arts and literature, and extending "only to articles originally devised under that en- "couragement, are not deemed monopolies. Both "these classes of grants have, however, been con- "demned by some as partaking of the character "of monopolies.

"In polit. econ., and as used in a general sense in "law, such an exclusive privilege to carry on a "traffic, or deal in or control a given class of articles, "as will enable the holder to raise prices materially, "above what they would be if the traffic or dealing "were free to citizens generally. In this sense, "that exclusive control of a particular kind of "product which results from the legitimate owner- "ship of the only land from which it can be obtained, "as in the case of some mineral waters, or earths, or "ores, is sometimes spoken of as a *natural monopoly*, "in contrast to the *artificial monopolies* created by "state grant.

"*Virtual monopoly*, a term in constitutional law "and the history of legislation (the appropriate "applications of which have been much contested) "used to characterize a business which, though not "declared by law to be a monopoly or exclusive fran- "chise protected as such, as by a patent or an ex- "clusive charter, is yet so related to the great "channels and currents of commerce that the allow- "ing of it to enjoy the same protection as other "private property and business secures to it in- "directly exclusive advantages substantially equiva- "lent to a legal monopoly. Thus the great grain- "elevators of modern commerce, although erected "as private property on private lands, if by their "situation they have exclusive advantages for the "transfer of grain from vessels at the wharf to the "railroad terminus of a trunk-line, are said to con-

"stitute a *virtual monopoly*, because, if not sub-
"jected to a legislative power to restrict their
"charges such as other property and business are
"not subjected to, they might be conducted in a
"manner *oppressive* to commerce."

Even if we should concede that a purchase of the majority of the shares of stock of two competing railway companies is a monopoly of those shares, such purchase does not amount to a monopoly of the trade or commerce conducted by the companies themselves, inasmuch as it does not affect the autonomy of either company. Even if the purchase may lessen, or perchance destroy, the motive to compete, it does not in any way monopolize the trade or commerce itself. This continues to be conducted, as before, by the companies themselves, through their respective organizations. As was said by this court, speaking through Mr. Justice Brown, in the Pearsall case:—

"The companies would still remain separate cor-
"porations with no interests, as such, in common."

It seems almost absurd to speak of an acquisition of the bulk of the shares of one competing railroad company, and of three-fourths of the shares of another competing railroad company, as a monopolization of their trade or commerce. Even if an ownership of the properties of the two railroad companies by one corporation could be spoken of as such monopolization, it would be impossible so to speak of such ownership of shares, where a minority of shareholders retain a right to demand, not only that the corporation shall transact its own business, but that it shall transact it in accordance with its corporate duties, and in recognition of the rights of all the shareholders.

It may be conceded that a common owner of a majority of the shares of competing companies will have no prepossession in favor of ruinous competition and will be likely to elect, as directors, persons who, to such extent

as will be legal and proper, will have no prejudice in favor of ruinous competition. The power of such common owner, however, ends with the election of the directors. Such election is not made a misdemeanor. The management of the company will be controlled by the directors thus elected, who will be bound to perform their duty to the public and to the corporation itself—to the minority, as well as to the majority, shareholders.

The directors may, and probably will, find, in the case of each corporation, that its interests will best be furthered by low rates, by improved facilities and by the doing of whatever will be calculated to extend its business.

In the case of the Northern Pacific, and of the Great Northern, the laws of the States by which, respectively, they were created, require that the board of directors of each, shall be composed of persons not acting as directors of any competing company. Not only is the organization preserved, but each company must act independently, through employees, chosen by the directors, properly to conduct the business of transportation, and who, presumably, will thus conduct the same.

The law imposes duties upon every railroad company and upon its managers which, if properly performed, will render impossible any restraint of trade or monopolization thereof.

The necessary result of the election by the same person or corporation, of two different boards of directors for the two companies, will not be any restraint of trade. If such restraint shall result from the subsequent action of the boards, the Sherman Act will be violated, and those who engage therein will be punished. It will be impossible to do anything in restraint of trade, by way of monopolization, without some concert of action between the different boards. Such concert of action, if it exists, will be a fact which can be proven.

The board of directors, chosen by the same electorate, will possess the power to do illegal acts; but they would possess a similar power if chosen by different electorates.

The law does not punish as criminal the possession of power, but the illegal use thereof. The possession of a razor, and with it the power to kill, would be insufficient to support an indictment for murder.

The railway corporations whose shares are held by the Northern Securities Company, are not, and, under the laws of Minnesota and of Wisconsin, cannot, be managed by the stockholders. It is not likely that the persons chosen to fill such important positions, nor that those selected to fill the executive offices, will be other than men of ability and of high character. Why shall it be presumed, as against them, that they will violate the law?

In many of our States the judges, and in all of them the Chief Executives, are elected by the people, by reason of nominations by one, or other, of the great parties. There is no presumption, because elected by a party, with whom naturally they will be in sympathy, that they will not decide, or administer, the laws, in accordance with their obligation. The judge always, and the Chief Executive usually, forgets, after his election, the origin of his power, and recognizes his duty to the whole community.

We concede that a "monopoly," as now understood, involves something more than what was understood by Lord Coke; but in modern, as well as in ancient, times, the underlying idea, as we have endeavored to show, contains the element of a restraint—of *exclusion*. This is no longer, ordinarily, the result of a Government grant; but of contracts between parties having the power to exclude others from carrying on a trade or manufacture, which they exercise.

The purchase by one person, of the property of his rival, with the intention thereby to destroy his competition, is not illegal, although by the purchase he will acquire the power to prevent the same. Such was the decision of this court in Oregon Coal Company *vs.* Winsor, 20 Wall., 64.

Non-competition is not punished by the Sherman Act. An agreement not to compete is by it punished, because it is a contract to restrain trade.

The State has the sole power, in the first instance, unless the United States shall construct its own highways, to determine what highways, turnpike, railroad and others, shall be constructed. It may find it essential to its development, that a railroad shall be constructed between certain points and may find it unable to secure such construction, saving by a grant of an exclusive privilege. If, under such grant, a railroad is constructed by a company formed for that purpose, which, thereafter, becomes part of a system of connecting railroads over which interstate commerce is transported, will those owning or controlling the railroad, or its shares, be indictable under the second section?

It is the monopolization of the *trade or commerce* which is prohibited. The purchase of the shares does nothing more than confer a power to elect the managers of the corporation. Thereafter, as before, each corporation must conduct its own trade or commerce. Neither can monopolize the trade of the other. The owner of the shares cannot monopolize it because he can, in no way, conduct it.

How, in view of the fact that it is universally considered by nearly all jurists and text-book writers, that the joinder in one ownership, of competing manufactories, does not monopolize trade, can it be successfully argued that such acquisition of ownership of the shares of competing railways, or even of the properties themselves, can be held to be a monopoly?

In the Joint Traffic Association case, 171 U. S., 505, Mr. Justice Peckham said (page 567):—

> "We are not aware that it has ever been claimed "that a lease or purchase by a farmer, manufacturer "or merchant of an additional farm, manufactory "or shop, or the withdrawal from business of any "farmer, merchant or manufacturer, restrained com- "merce or trade within any legal definition of that "term."

At the time of the formation of the Northern Securities Company, the Great Northern and the Northern Pacific,

each possessed a so-called monopoly of the greater portion of the business done by it, because there was no other railroad accessible to shippers, by which it could be done. Would it, by giving such low rates, and by affording such facilities as would make it financially impossible for a competitor, with profit, to enter its territory, expose itself to the malediction of the second section?

How can it possibly be said that a corporation, not engaged in the business of transportation—an investment company—monopolizes interstate trade or commerce, because it holds the majority of the shares of two competing railway companies which do, and which must, continue to do business, each for itself. The most that can be said by way of objection to the acquisition is, that it diminishes the motive to compete; but this diminution of motive to compete does not involve any diminution of the total amount of commerce, or the giving to one, any portion of the trade or commerce theretofore transacted by the other. Each one, of two separate organizations, despite the alleged monopolization of shares, must conduct without change, the business for which it was incorporated.

A., B. and C. may each own one-sixth of the shares of two competing railways, with no possible right on the part of the United States to object. Each acting separately, may give to D. a voting proxy. Will they thereby monopolize commerce?

**V. A person or corporation, by holding, as owner, the majority of the shares of two competing railway companies, does not monopolize, or attempt to monopolize, "any part of the trade or commerce "among the several States."**

It is unnecessary, under this head, to make comment, additional to that made under the preceding proposition.

The holding of the shares enables the Northern Securities Company to elect the directors of the two railway companies; but each company of itself, must conduct its

trade and commerce which can be monopolized by neither. Such holding of shares cannot bring about, even indirectly, a monopolization of trade or commerce, because nothing would be gained by the owner by transferring the trade of one to the other.

**VI. The power of Congress to regulate commerce does not confer upon it a right to prescribe the persons who may engage therein, or to regulate, or to control, the ownership of shares of stock of corporations who engage therein.**

The Northern Pacific and the Great Northern, were incorporated, respectively, by the States of Minnesota and of Wisconsin. The issuance by each of those companies, of its shares of stock, was under the laws of one, or the other, of those States. The transfers of said shares, and all matters connected with the ownership thereof, are matters regulated exclusively, and must continue to be regulated exclusively, by the State.

It is not within the power of Congress, under its right to regulate commerce, to prescribe who shall own, or the restrictions upon, sales of stock in the corporations of the different States, even though those corporations may carry on the business of transportation—a business which may be regulated by Congress. This court so asserted, in unmistakable language, in United States *vs.* Knight, 156 U. S., 1, when, speaking through its Chief Justice, it said:—

> "Congress did not attempt thereby" (the Sherman Act) "to assert the power to deal with monop-
> "oly directly as such or to limit and restrict the
> "rights of corporations created by the States, or
> "the citizens of the States, in the acquisition, con-
> "trol or disposition of property, or to regulate or
> "prescribe the price or prices for which such property,
> "or the products thereof, shall be sold; or to make
> "criminal the acts of persons in the acquisition and
> "control of property which the States, or their
> "residents, or the nation, sanctioned or permitted."

This was said in connection with a denial of the claim of the United States, that the acquisition by a New Jersey company, of the shares of certain Pennsylvania corporations, in connection with the acquisition of the shares of other corporations, such corporations controlling the business of sugar refining in the United States, was in violation of the Sherman Act.

In the Knight case, the companies whose shares of stock were acquired by the American Sugar Refining Company, were incorporated under the State laws "for the purpose "of *importing*, manufacturing, refining and dealing in sugar "and molasses." The companies whose shares were owned by the American Sugar Refining Company, manufactured about ninety-eight per centum of all the refined sugar manufactured in the United States. It was found, in that case, that "the object in purchasing the Philadel- "phia refineries was to obtain a greater influence or more "perfect control over the business of refining and selling "sugar in this country."

In Louisville and Nashville R. R. Co. *vs.* Kentucky, 161 U. S., 693, it was said:—

> "It is true, as was observed in Pearsall *vs.* The "Great Northern, that the stockholders of the L. "& N. Co. may individually become the purchasers "of the Chesapeake Company at a judicial sale, "and may organize a new corporation, but it would "still be a corporation separate and distinct from "that of the L. & N. R. R. Co. The inhibition of "the Constitution is not against the sale to in- "dividuals, though they may chance to be stock- "holders in a competing line, but against the ac- "quisition by a railway, in any form, of a parallel "or competing line."

Under the power to regulate commerce, the United States may demand that the highways thereof, shall be kept open; that they shall be used under restrictions and regulations by it prescribed; that no contract shall be made restraining transportation over the same; that no combinations restraining such commerce, shall be entered

into; that no contracts shall be made, monopolizing such highways or their use; and that the instrumentalities, necessary in the conduct of the business, shall be supervised and used, under prescribed regulation and regulations. All this may be done, under its power over commerce. In addition to this, it may call into existence, by creating corporations of its own, organizations which will conduct commerce. It may cause to be constructed through the States such highways as may be deemed necessary for carrying on such commerce. As against the construction of such railroads, no exclusive privileges granted by any State to its corporations, would prevail. The States, however, may also call into existence, or may refuse to call into existence, corporations to conduct the business of transportation through their respective territories. They may refuse to permit the construction of railroads by their citizens. They may give to corporations of their creation, privileges which, as against other corporations they may or might create, will be exclusive. They may permit, or may refuse to permit, the consolidation of parallel and competing lines. They may permit railroad companies which, under their authority, have constructed railroads, to abandon the same. They may vacate their own highways, though, whilst such railroads or other highways exist, the Government may insist upon their use by way of facilitating intercourse between the States. Congress has no power to interfere with a State in any of these matters. It was contended, in Kentucky *vs.* Louisville and Nashville R. R., that the consolidation of parallel or competing railroads used in interstate commerce, was a matter of commerce, and that being such, the jurisdiction of Congress was exclusive. This court held, however, that such consolidation was a matter for State determination and regulation.

The States which create railroad corporations, may prescribe the manner of issuance of their shares; and the method of transfer of title thereto. These matters are exclusively within the State jurisdiction.

In the use and operation of railroads engaged in inter-

state commerce, the corporations owning the same must submit to the Federal jurisdiction to the fullest extent. This submission, however, does not involve any right on the part of the United States, to forbid "A." to sell to "B.," the shares to him belonging, even though, as a result, an ownership of a majority, or of the controlling interest, will be transferred.

A. may own the controlling interest in one competing railroad, whilst B., his father, may own the controlling interest in another. By the intestate law of the State of residence of both, B.'s shares, upon his decease intestate, might vest in A. Would A., thus acquiring the controlling interest in both railroads, be liable to punishment as a criminal?

The owners of all interstate railroads, however, in their *use* of the same, must do whatever Congress shall determine to be necessary, in the conduct of their interstate transportation.

It is not within the power of the Federal Government, to destroy the title to property created by the State. Whilst the former may regulate the use of the power which results from ownership, it cannot regulate, or deal with, the ownership itself. One of the incidents of ownership is the right of disposition. The title to the shares is derived under exercise by the State of its power, and is subject alone to its regulation.

The Federal Government could not prevent a railroad corporation, owning a railroad solely within the limits of a State, if permitted by the State so to do, from disconnecting its railroad with roads outside of the State and from conducting thereafter, within the limits of the State, a purely local business. The remedy for such action would be the creation of railroads by the United States, or by its corporations. It is not within the power of the Federal Government to compel a railroad, separated from railroads outside of the State, to connect therewith, and to do an interstate commerce, nor to insist that railroad corporations will compete. All it can do is to punish them if they restrain interstate commerce by *agreeing* not

to compete, or otherwise. Over the motives of a corporation which acquires railroad shares and, with them, a disinclination to compete, it has no control. It must take the results which will follow from any change of ownership, authorized by the State creating the railroad corporation. The overt act of restraint, alone, is, by it, punishable.

Congress has unrestricted power to prevent restraint, or monopolization, of interstate commerce, if monopolization is understood, not as the United States claims, but as the authorities define it. The Sherman Act, properly understood and interpreted, is constitutional. Why should its provisions be so interpreted as to make it violative of State rights?

In Grenada County Supervisors *vs.* Brogden, 112 U. S., 261, it was held by this court that that construction of a statute should be adopted which, without doing violence to the fair meaning of the words used, brings it into harmony with the Constitution.

In Hawaii *vs.* Mankichi, 190 U. S., 197, it was held that in interpreting a statute the intention of the law-making power will prevail even against the letter of the statute; a thing may be within the letter of the statute and not within its meaning, and within its meaning, though not within its letter.

A State, within its borders, may have three competing railway companies, two of which are unable, standing alone, successfully to maintain a competition. Why may it not permit them to consolidate? How will any right vested in the United States be affected by such consolidation?

The United States insists that an owner of shares, created by the law of a State, may not make a sale of the same in that, or in any other State; that such sale is a crime. It rests its insistence upon a statute of the United States which does not profess to deal with such sales, but prescribes a penalty for the doing of something entirely different—a well-defined common-law misdemeanor. We think we may say, without contradiction, that no case can be found, certainly no Federal case, which holds that the ownership of property is an illegal restraint of trade.

In Railroad Company *vs.* Maryland, 21 Wallace, 456, a stipulation in the charter of a railroad company, that the company should pay to the State a bonus, or a portion of its earnings, was held not repugnant to the Constitution of the United States. Such a stipulation was held to be different, in principle, from the imposition of a tax on the movement or transportation of goods, or persons, from one State to another, the latter being an interference with, and a regulation of commerce between, the States, and beyond the power of the State to impose. Mr. Justice Bradley said:—

"This unlimited right of the State to charge, or "to authorize others to charge, toll, freight, or fare "for transportation on its roads, canals, and rail- "roads, arises from the simple fact that they are "its own works, or constructed under its authority. "It gives them being. It has a right to exact com- "pensation for their use. It has a discretion as "to the amount of that compensation. That dis- "cretion is a legislative—a sovereign—discretion, "and in its very nature is unrestricted and uncon- "trolled. The security of the public against any "abuse of this discretion resides in the responsibility "to the public of those who, for the time being, "are officially invested with it. In this respect it "is like all other legislative power when not con- "trolled by specific constitutional provisions, and "the courts cannot presume that it will be exercised "detrimentally.

* * * * * * *

"It is often difficult to draw the line between "the power of the State and the prohibitions of "the Constitution. Whilst it is commonly said "that the State has absolute control over the cor- "porations of its own creation, and may impose "upon them such conditions as it pleases; and like "control over its own territory, highways, and "bridges, and may impose such exactions for their "use as it sees fit; on the other hand, it is conceded "that it cannot regulate or impede interstate com-

"merce, nor discriminate between its own citizens "and those of other States prejudicially to the lat- "ter. The problem is to reconcile the two propo- "sitions; and as the latter arises from the provi- "sions of the Constitution of the United States, "and is, therefore, paramount, the question is prac- "tically reduced to this: What amounts to a regu- "lation of commerce between the States, or to a "discrimination against the citizens of other States? "This is often difficult to determine. In view, how- "ever, of the very plenary powers which a State "has always been conceded to have over its own terri- "tory, its highways, its franchises, and its corpo- "rations, we cannot regard the stipulation in ques- "tion as amounting to either of these unconstitu- "tional acts. It is not within the category of such "acts. It may, incidentally, affect transportation, "it is true; but so does every burden or tax imposed "on corporations or persons engaged in that busi- "ness. Such burdens, however, are imposed *diverso* "*intuitu*, and in the exercise of an undoubted power.

In Ashley *vs.* Ryan, 153 U. S., 436, a State was permitted, in allowing consolidation between corporations of different States, to charge upon the new consolidated company a percentage on its entire authorized stock as a fee, inasmuch as, without the franchises conferred by the State, it could not exist, and such charge was not an interference with interstate commerce. Mr. Justice White said:—

"The question here is not the power of the State "of Ohio to lay a charge on interstate commerce, or "to prevent a foreign corporation from engaging "in interstate commerce or to prevent a foreign "corporation from engaging in interstate commerce "within its confines, but simply the right of the "State to determine upon what conditions its laws "as to the consolidation of corporations may be "availed of.

"Considering, as we do, that the payment of the "charge was a condition imposed by the State of "Ohio upon the taking of corporate being or the "exercise of corporate franchises, the right to which

"depended solely on the will of that State, and hence "that liability for the charge was entirely optional, "we conclude that the exaction constituted no tax "upon interstate commerce, or the right to carry "on the same, or the instruments thereof, and that "its enforcement involved no attempt on the part "of the State to extend its taxing power beyond its "territorial limits."

**VII. The relief decreed was improper under any aspect of the case.**

The decree of the court below permitted the continued ownership of the shares; but, with a refinement of cruelty, denied the exercise by the corporation which owned the same, of any of the rights of ownership.

The act which was condemned, was the acquisition of the controlling interest in the shares of two competing railroad companies. If this ownership violated the Act, the violation could have been prevented, by a decree compelling the sale of so many of the shares of the Great Northern, or of the Northern Pacific, as would reduce the ownership to a holding of less than a controlling interest therein.

If there was a conspiracy to buy, it was consummated by the purchase. The conspirators were indictable. It was too late to make avail of the equity jurisprudence to restrain what had been accomplished.

In United States *vs.* Knight, 156 U. S., 1, 17, it was said:—

"The subject matter of the sale was shares of "manufacturing stock, and the relief sought was "the surrender of property which had already "passed and the suppression of the alleged monopoly "in manufacture by the restoration of the *status quo* "before the transfers; yet the act of Congress only "authorized the Circuit Courts to proceed by way "of preventing and restraining violations of the Act "in respect of contracts, combinations, or con- "spiracies in restraint of interstate or international "trade or commerce."

JOHN G. JOHNSON.

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# Supreme Court of the United States.

OCTOBER TERM, 1903.

No. 277.

NORTHERN SECURITIES COMPANY ET AL,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellees.

## Oral Argument of George B. Young, for the Appellants, in reply to the Attorney-General, December 15, 1903.

MAY IT PLEASE THE COURT:

The defendants here are charged with a "combination or conspiracy in restraint of commerce"—and I shall use the word "commerce" as limited to interstate or foreign commerce or both, those only being the subject of the Anti-trust Act.

The defendants are not here saying: "We have restrained commerce, or combined or conspired to restrain it, but we have kept ourselves outside of the law, and what are you going to do about it?"

On the contrary, they say that whatever combination is shown by the record, whatever combination they have entered into, was for the sole purpose of freeing commerce from restraint, of developing, enlarging and protecting a great interstate and oriental commerce, and this is what they have done. They have neither combined to restrain commerce, nor have they restrained it.

This has been clearly pointed out by Mr. Johnson, and needs no restatement.

Nor do the defendants seek to limit in any way the power of Congress over commerce or the scope of the Anti-trust law.

The scope of that law has been fixed by four decisions of this Court. Whatever differences of opinion may have existed among individuals on the questions at issue in those cases, such differences can no longer exist. The decisions are conclusive, and so far from questioning, we rely upon them.

The Anti-trust Law embraces *every* contract, combination or conspiracy in restraint of commerce. But our contention is that the questions in this case have to do, not with commerce, but with property. That the combination of the defendants was a combination to sell shares of stock to the Securities Company, and that neither such sale, nor the combination to make it, was a matter of interstate or foreign commerce.

Before pursuing the argument on this point, and discussing the Attorney-General's positions on the law of the case, I desire to refer briefly to one or two matters of fact. The petition charges a combination or conspiracy to do two things : (1) to organize the Nor-

thern Securities Company, (2) to transfer to it the shares of the two railway companies held by the conspirators.

The evidence shows that they held less than thirty-five millions—less than thirty per cent.—of Great Northern shares. They held less than forty-two millions—less than thirty per cent.—of the shares of the Northern Pacific.

They desired the acquisition by the Securities Company of a majority of Northern Pacific shares, and looked forward t such acquisition. They were indifferent to the acquisition by the Securities Company of any shares of the Great Northern Company beyond the thirty-five millions or less held by themselves, and the greater part of which they expected (though they did not so agree) would be transferred to it.

Such combination, being at the most a combination to transfer to or procure for the Securities Company a majority of shares of one railway company only, could not be, nor does the Government claim it to be, a combination in restraint of commerce.

The decree finds, and the Attorney-General asserts (what the petition does not allege) that the conspirators agreed with each other to procure the other shareholders of the Great Northern to transfer their shares to the Securities Company, and that, of the ninety-five millions obtained by that company, the sixty millions or more obtained from such other shareholders were obtained by means of such procurement. Also, that the Securities Company, on its creation, became a party to the conspiracy.

Each and every of these statements is not only without evidence, but is directly contrary to the evidence, as is fully shown in my brief and that of Mr. Grover.

But assuming that the Defendants did combine or conspire to transfer their own shares to the Securities Company, and help it to get enough more to give it a majority of the stock of each railway company, we insist that such combination was not in restraint of commerce.

The Anti-trust Act does not define the term "in restraint of trade or commerce." For their meaning we must look to the common law. In this law, as said by Mr. Justice PECKHAM in the Freight Association Case, they had been known for hundreds of years. "Contracts in restraint of trade" are a familiar subject in the common law, and in that law the term "restraint of trade" is not (or, at least, was not, prior to the Anti-trust Act) applied to any other restraints or obstructions of trade than the restraints imposed by a contract upon the trade of one or more of the parties to it.

Contracts, combinations or conspiracies to hinder or restrain or obstruct or otherwise injure the trade of others were not at common law distinguished from other conspiracies to injure others by the fact that such conspiracies were directed at their trade rather than at their persons, their property or their reputations. So far as I am aware they were never known or designated as conspiracies, etc., "in restraint of trade." And no contract, conspiracy or combination could be in *direct* restraint of any trade except the trade of the parties to it.

The gist of the decision below is that the combination here was a conspiracy in restraint of commerce, because its aim was to suppress competition between the two railway companies. But the suppression of

competition does not necessarily restrain trade or commerce, and a combination that results in removing competition is not necessarily one in restraint of trade or commerce.

In each of the three cases in this Court where the combination was held to be within the Anti-trust law, the combination was effected by an agreement which, in its terms, restrained the trade or commerce of the parties to it by restraining their freedom of carrying it on in essential particulars.

In the two railway traffic cases—the Freight Association Case and the Joint Traffic Case—each party to the contract surrendered for a greater or less time its right to make its own rates in its own commerce. And so, upon the execution of the contract, commerce was restrained by it—it was in restraint of commerce—whether it was ever carried out or not.

It was in the restraining of the freedom of each company to make its own rates, independently of the others, that the restraint lay, not in the committing of the rate-making power to a board or a commission.

It is true that the contracts, being between competing railways, would result in a suppression or diminution of competition; and much is said in argument and opinion in those cases as to the effect on competition.

But it is not the effect on competition that causes or is essential to the restraint of trade. It is itself, where it occurs, a consequence rather than a cause or an element of the restraint.

Contracts between railway companies by which they surrender or restrict their independent rate-making power—place shackles on their liberty of conducting their own business in their own way—are just as much

in restraint of trade when the companies' lines are not, as when they are competitive. And the suggestion of such a contract between non-competing lines is not wholly fanciful. The system south of Boston connects, but does not compete, with that north of it. But if either should make a considerable reduction in rates, the patrons of the other would soon be taking steps to secure a like reduction for themselves. Hence it might well be for the interest of both companies to make such a contract to secure each from the consequences of a reduction by the other.

And so a suppression of competition which does not result from a contract restricting one or more of the parties to it in their freedom of trade has never been considered a restraint of trade; and so a contract involving or resulting in such suppression, but not restricting the liberty of trade of any of the contracting parties, has never been considered a contract in restraint of trade.

In the City of New York there are probably twenty-five or fifty or perhaps one hundred wholesale houses, in the same line of business, competing with each other in interstate trade. If one of these wishes to retire, can it not sell out its business to one of its competitors without buyer and seller being alike guilty of a prison offense? Yet such sale undoubtedly suppresses competition. And so would a partnership or corporation formed by two or more of these competitors. So would a partnership or corporation formed by others not already in the trade, to buy out the business of two or more of the competitors.

And so with carriers. Two competing stage lines, on a route ten miles long between a town in New

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Hampshire and a town in Vermont are very different from two trans-continental railways; but the Anti-trust Act makes no distinction between them, just as the mercantile law applies the same rules to a note for ten dollars and a note for a million.

Now it never was heard that one stage-owner might not buy out the other; or that the two might not form a partnership or corporation to carry on the business of both; or that a third person, or a partnership or corporation formed for the purpose, might not buy and carry on the business of both.

And so it is said in the Freight Association Case, and repeated in the Joint Traffic Case, that such purchases, and formation of partnerships and corporations to unite competitive businesses in one ownership and management, are not within the Anti-trust Act.

And this must be because they are not in direct restraint of trade at all, for the same cases hold that *every* contract which is in direct restraint of trade, however slight and however reasonable such restraint may be, is illegal and criminal.

In the Addyston Pipe Case, the defendants entered into a contract by which each restricted his freedom of trade in respect of the territory in which he might sell the goods made by him, and the prices he might charge, and in other particulars. Such a contract was clearly in restraint of trade at common law, whether made between competitors or non-competitors.

There remains the E. C. Knight Case, the first one decided under the Anti-trust Act. The full scope and effect of the decision in this case cannot be fully appreciated without careful consideration of the facts. The American Sugar Company bought the shares of four

refining companies in Philadelphia, which, with its previous possessions, gave it control of 98 per cent. of the sugar refineries of the country. The business of the American Company and of each of the companies whose stock it bought was the purchase and importation of raw sugar, the refining of it, and the selling of the product in the various states.

Though the companies were thus incorporated to deal in sugar, and were actually doing so, yet the purchase of their shares was held not to restrain interstate commerce—and this, though the result of such purchases should be (as it well might) the suppression of competition, or even (as charged by the Government) the creation of a monopoly.

Now, taking these four cases together, it is plain that if, instead of a purchase of the shares of the sugar-refining companies, the Knight case had been one of an agreement between the companies (each carrying on its business), restricting the liberty of any of them to buy its raw sugar and sell its refined sugar where it would, at what price it would, and in what quantities it would, such agreement would have been clearly a contract in restraint of trade at common law, and within the Anti-trust Act.

On the other hand, if one or more of the parties in the Addyston Pipe Case had sold out to the others, or if all of them had formed a partnership or corporation to carry on the business, none of these contracts would have been in restraint of trade at common law, or under the Anti-trust Act.

And so if the railway companies in the two traffic cases, instead of making a contract in restraint of their individual liberty in carrying on their commerce, had, all but one of them, sold their roads to that one, or

had all sold to some other company, or had all consolidated so as to form a new single corporation, these agreements for sale or for consolidation would not have been contracts or combinations in restraint of commerce.

In such case the parties to such agreements would not be contracting in restraint of their liberty—making a contract in restraint of commerce. They would be *exercising* their liberty—a liberty incident to ownership—of selling their property, to persons exercising their liberty to buy.

In these cases any suppression or diminution of competition consequent on the sale or consolidation is not the effect of any contract or combination restraining the liberty of the parties to it to carry on business in their own way, whether by competing or otherwise. The parties make no such contract or combination. It is the immediate result of the ownership by one person, partnership or corporation of two or more properties or businesses theretofore competing (or at liberty to compete) with each other.

The power of such single owner to suppress or diminish such competition as theretofore existed, and any suppression or diminution that may occur, is an incident of his ownership, just as the right of the former owners to sell is an incident of their ownership,—an incident, in each case, inseparable from absolute ownership.

And this right, being an incident of ownership, is the same, however the ownership may be acquired, whether by purchase, gift, inheritance or otherwise.

So in this case there is no contract by which any one binds himself not to compete. The defendants have entered into no contract, conspiracy or combina-

tion not to compete among themselves, or to prevent the railways from competing, or to restrain the commerce of any of them. If the mere ownership of the shares by the Securities Company does or will suppress competition, this can only be because of some control, belonging as an inseparable incident to such ownership, over the property and commerce of the railway companies—just as the suppression of competition in the instances cited is the result of a control over business and property incident to ownership of them.

The decisions of this Court, therefore, are in accord with the common law that purchases and sales of their property or business among competitors, and purchases by individuals, partnerships or corporations of the competing businesses of other persons, are not in restraint of trade or commerce.

And even if the words "restraint of trade," etc., in the act were given a broader meaning than at common law, so that a "conspiracy in restraint of trade or commerce" should include a conspiracy to do acts which will not restrain the commerce of the parties to it, but will merely hinder, obstruct, or restrict the commerce of others, still the fact would remain, that the only restriction or obstruction of commerce that is or can be claimed in this case proceeds not from the alleged combination or conspiracy, but wholly from the union of ownership of a majority of the shares of the railway companies in a single person, viz., the Securities Company, and hence is not a restraint of commerce, nor is the "conspiracy" in restraint of commerce, within the act and the decisions of this Court.

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The Defendants have not been guilty of monopolizing, or attempting or conspiring to monopolize any part of the interstate or foreign commerce of the country, nor are they threatening to do any of these things.

The Anti-trust Act does not define "monopoly" or "monopolize." The common-law meaning of these terms is well known. In popular use the word "monopolize" often means to possess the whole of a property or business. And in this popular sense, the word is often used in judicial opinions. In several opinions of this Court it is said that a railway monopolizes the traffic, or most of it, along its lines. A like remark is made by Mr. Justice BROWN in the Pearsall case, and he gives the same meaning to the word when he says in the same opinion that the two defendant railway companies, if consolidated, would monopolize the commerce of Northern Minnesota, etc.

But the word cannot, in the Anti-trust Act, be given this meaning, a meaning which would make all railway operations criminal.

The Counsel for the Government has defined "to monopolize" as to concentrate in the hands of one or a few a business or employment theretofore in the hands of several so as to control competition. But under this definition, all the purchases in the instances I have given, of a wholesale business or a stage line, whether made by one competitor of another, or by a partnership or corporation, would be criminal. Yet this Court has expressly declared them to be lawful.

Before the days of railways there was a great competitive interstate commerce by wagon and stage coach between Boston and Albany, Boston and New York, over the Cumberland road, etc. Far-seeing men, the

Hills and Morgans of that day, planned and contrived to acquire for themselves the greater part of this commerce by means of building and operating railways. They did so, and thereby, in case of each railroad, concentrated in the hands of one company the competitive commerce theretofore carried on by many persons and corporations.

Had there been an Anti-trust Act in those days, would they have been criminals in so doing, because "monopolizing" such traffic?

It is no answer to say that they were authorized by state charters. No state has power to legalize a monopoly of interstate commerce. The power of Congress to regulate it in such a particular is exclusive. The obtaining of state charters would be an aggravation of their offense, adding unconstitutional state legislation to their own crime in monopolizing, and thus obstructing, commerce.

It is not easy to frame a definition of the term "monopolize" as used in the Act. That of Mr. Justice JACKSON, quoted in my brief, is the best I have found. He says, in substance, that to monopolize is to acquire an exclusive right to any part of the trade or commerce among the states by means which prevent or restrain others from engaging in it.

This accords with the common-law idea of a monopoly in making the essential thing, not the possession of all of a particular trade or commerce, but the exclusion of others. An inventor or author gets by his copyright or patent no greater right than he would have without it to print and sell his book, or to make, use or sell his patented article or process. The value of his patent or copyright—the essence of his mon-

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opoly—is his right to exclude every one else from doing what he may do.

Just how any one may acquire a monopoly, in the absence of a law granting it; how he may acquire an exclusive right to carry on commerce by other means, is not very clear.

But, for this case, it is enough that there is absolutely nothing to show any attempt or conspiracy to exclude any one from engaging in or carrying on commerce anywhere in the country.

Moreover, to monopolize commerce, one must be engaged in it. The Securities Company, against which the charge is made, is not, has never been, engaged in commerce. It is a mere shareholder in two railway companies, but that does not make it a railway operator or a railway company. A man who buys bank stock does not become a banker, and a purchase of shares in a base-ball club doesn't make him a base-ball player. The record shows no case of monopoly or of attempt or conspiracy to monopolize.

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This is a case of purchase of shares in two railway companies, each chartered by a state.

Did Congress intend to interfere with the power of the states to regulate stockholding in such corporations?

I do not propose to discuss at any length the question of the power of Congress to regulate purchases and sales of property, or the incidents of ownership of property. That has already been done in the arguments here and in the briefs. But I

think it will be generally conceded that there can hardly be a better guide to the construction of the commerce clause of the Constitution or the meaning of Congress in passing the Anti-trust law, than the unbroken practice of the states from the foundation of the Government down to the passage of the act, a practice continued for generations, a practice by which the railway systems of the country have been built up.

During all this period the states have claimed and exercised the power, never doubted or questioned by any one, to authorize or to forbid their transportation or other companies doing interstate business to consolidate with competing companies, or to purchase or lease the lines of competing companies, or to purchase and hold their stock. On the faith of such legislation, hundreds of millions of dollars had been invested by hundreds of thousands of investors before the Anti-trust Act was passed. A detailed history of growth of some of the principal railway systems by means of such consolidations and purchases of the lines and shares of competing companies will be found in the record, and is summarized in my brief.

All this was known to Congress when it passed the act. Is there any reason to suppose that Congress did not recognize—what everybody else believed at that time—that such legislation was in the power of the states? Any reason to believe that it supposed that such purchases, leases and stockholding were matters of interstate commerce, and the state legislation a usurpation of powers belonging to itself alone?—for if these are matters of interstate commerce, and hence within the power of Congress, its power over them is exclusive.

If Congress did believe that such power belonged not to itself but to the states (whether that belief was correct or not), it certainly did not intend by the Anti-trust Act to exercise a power which it did not think belonged to it.

And if Congress did not share the universal opinion that these matters were for the states to regulate, is it conceivable that Congress meant to declare all such legislation unconstitutional, all such consolidations and purchases unlawful when made, and criminal if continued? all the stock and bonds issued on such consolidations and purchases worthless because issued to effect illegal combinations in restraint of commerce? and meant to express such sweeping condemnation by the general words "every contract, combination or conspiracy in restraint of trade or commerce among the several states or with foreign nations is hereby declared to be illegal," and is made criminal?

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The Attorney-General has gone back to the Pearsall case, brought in 1895, and has said that the contract in that suit was a scheme of Messrs. Hill and Morgan to put the Great Northern Company in control of the Northern Pacific Company, and that this purpose continued down to the formation of the Securities Company. But nothing in the report of that case justifies any such statement. Mr. Morgan had nothing to do with it. True, he conducted the reorganization, finally made, of the Northern Pacific Company. But this reorganization was made after the decision in the Pearsall case, and was very different from that involved in that case, as appears by comparing the report of the

Pearsall case with the plan of reorganization afterwards made, which is set out in the record. Thus, in the earlier plan, the total stock was to be 100 millions, in the later, 155 millions, etc.

No, the scheme defeated in the Pearsall case did not originate with "Oriental dreamers," but with hard-headed bankers of Germany. The Deutsche Bank held or represented all or nearly all the bonds of the old Northern Pacific Railroad Company. They had seen that company, with its priority over the Great Northern, and its land grant as large as Minnesota, wrecked by mismanagement, while the Great Northern, with no land grant and no subsidies of any sort, had never failed to pay a dividend. And they paid to the president of that rival line the great compliment of asking him to undertake the management of that which was to be their own, and this in connection with the management of his own company. And they offered him a great stock interest in the new company if he would assume this labor and responsibility. Mr. Hill declined, for the same reason that the promoters of the Securities Company gave all Great Northern shareholders an opportunity to come into it; he would not make any arrangement in which all the Great Northern stockholders were not to share. According, the offer was modified, so that 50 millions of the stock of the new Northern Pacific Company should be issued for the benefit of *all* the Great Northern shareholders, and, as thus modified, was the basis of the contract considered in the Pearsall case.

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I have thus far assumed that the Securities Company purchased and absolutely owns all the shares it

has acquired. And this is what the record shows beyond dispute. The evidence will be found on pages 87 *et seq.* of Mr. Grover's brief, and on pages 82, 83, 90–95, of my brief, and in the passages in the record there referred to.

And the same references show that the shareholders, in selling to the Securities Company, acted individually on their own judgment without solicitation.

The contention that the Securities Company is in any sense a "trust," or any other than absolute owner of the shares held by it, has no support in the evidence and is in direct conflict with it.

The statement that the certificates of the Securities Company are in form or substance trust certificates, or are in substance or form any different from ordinary stock certificates of ownership of a specified number of shares of the capital stock of the company, is also without a scintilla of evidence to support it, and is not true in fact.

[NOTE. The Attorney General attempts to bear out his charge that this is the case of a trust by the following partial quotation from Mr. Morgan's testimony in the Power Case (I., 355):

"Q. Why put the stocks of both of these companies into one holding Company?

"A. In the first place this holding company was simply a question of custodian, because it had no other alliance."

To this should be added the rest of Mr. Morgan's testimony on this point (I., 361):

"Q. In referring to the Northern Securities Company by way of illustration you have used the example United States Trust Company once or twice. Are you to be understood that the Northern Securities Company held the several certificates in the nature of a trustee or as owner?

"A. As owner; but what I meant is this, while the Northern Securities Company as such issued stock for this, a trust company would have issued a receipt.

We have issued stock, consequently we could control it. I say, if I had put them in a company with $2,000,000 of stock it could have been easily controlled, but in the Northern Securities Company, which is the only company I know of up to this time where the stock itself is represented, you cannot control that stock without buying a majority of $400,000,000 or more of stock."

And the petition itself alleges (Par. VI., pp. 7*a*, 8*a*) that the parties combined to make the Securities Company "owner" of the railway shares, and also (Par. VIII., p. 10*a*) that the Securities Company is now holding "as owner and proprietor," a majority and more of such shares, and charges (Par. X., pp. 11*a*, 12*a*) that, unless enjoined, the Securities Company "will receive and acquire and hereafter hold and control as owner and proprietor all of the capital stock of the defendant railway companies, issuing in lieu thereof its own capital stock," etc.

And the Circuit Court finds in its decision that the defendants conspired to exchange their railway stock for Securities stock, "to the end that the New Jersey company might become the sole owner of the whole, or, at least, a major portion of the stock of both railroad companies" (II., 1704). It describes the acquisitions of the Securities Company as "purchasers" (II., 1705), and its relation to the shares held by it as that of "owner" (II., 1705), and its power to suppress competition as the result of its "ownership" (II., 1705, 1707).

And that Court distinguishes this combination from a "trust" (II., 1706).

This claim that the Securities Company is a "trust" is as novel as it is baseless.]

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The claim that the Securities Company issued its stock for the railway shares at inflated prices for the latter, besides being wholly immaterial, is contradicted by the record. Great Northern shares cannot be bought to-day—even in this time of depression—at the price ($180) at which they were taken by the Securities

Company; and if the Attorney-General can get Northern Pacific at $115, I advise him to buy all he can lay his hands on. He can sell them at once at a great advance. In point of fact, the Securities Company paid for the railway shares acquired by it 70 million dollars less than they would have cost it had it sold its own shares at par and bought the railway shares at the market prices—prices much in excess of $180 and $115. There was no "optimism converted into stock." And in spite of this and other lawsuits, the market price of Securities Company's stock has fallen less during the past eighteen months than that of the New York Central or the Pennsylvania or any other of the great investment stocks. And the organization of the Securities Company differed widely from every trust formation in the fact that there were no commissions paid to anybody to dispose of its stock or underwrite its sale. Its expense account was almost nominal.

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The Circuit Court and the Attorney-General alike treat the Northern Securities Company as if it were the sole shareholder in the two railway companies, and as if all, or at least a majority of its shares, were held by its promoters, the original conspirators.

But besides the "conspirators," owning about 33 million of Great Northern stock, and who transferred 30 millions to the Securities Company, there were some 1,800 other shareholders, holding 90 millions of its stock. Of these last, 1,200, holding 65 millions of stock, have transferred their shares to the Northern Securities Company, and there still remain 600 share-

holders with 25 millions of stock who have not "conspired," and still hold their shares.

And the promoting conspirators, so far from being or controlling the Securities Company, do not own to exceed one-third of its shares. The rest of the stock is owned by 1,300 persons, who never "conspired" or "combined."

It is those 1,300 persons who have the stock control of the Securities Company, so far as any section of the shareholders has it; and these 1,300 (and not the eleven conspirators) who exercise whatever control the shareholders of the Securities Company have exercised or can exercise over either railway company.

The outcome of the conspiracy of Messrs. Hill and Morgan to acquire control of the two railway companies is that they are left without control of either—without even the majority of common stock of the Northern Pacific Company which they once held.

It seems idle to say that men who must have known that such would be the result of their scheme, were conspiring to obtain control of both railways in order to restrain commerce.

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The unquestioned power of Congress under the commerce clause of the Constitution is amply sufficient to prevent and correct any restraint, monopoly or other evils in the carrying on of the interstate and foreign commerce of the two railways—and this without invading the exclusive power of the states to regulate the stockholding and stock transfers in their own corporations. And the states have the power—and the

exclusive power—to prevent and correct any restraint or monopoly, or other evils in the domestic commerce of the two railways. And the states, when creating any corporation, have the absolute, as well as the exclusive, power to forbid the holding of stock therein by a company like the Securities Company, or by any corporation whatever.

There is no excuse whatever for turning the Anti-trust Act into an instrument for invading the Constitutional rights of the states over the property within their borders, and over the corporations of their own creation.